Supreme Court, U.S.

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No. _____

In the

Supreme Court of the United States

October Term, 1997

ERIC WARNER, A MINOR, BY AND THROUGH LINDA WARNER, HIS MOTHER,

Petitioner,

v.

INDEPENDENT SCHOOL DISTRICT NO. 625, ST. PAUL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI AND APPENDIX TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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52 pp

QUESTION PRESENTED

Did the Eighth Circuit majority opinion properly conclude that Petitioner was not a prevailing party and therefore not entitled to an award of attorney's fees pursuant to 20 U.S.C. § 1415?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were Eric Warner, a minor, by and through his mother, Linda Warner, as plaintiff and St. Paul Independent School District No. 625 as defendant.

JURISDICTION

Petitioner seeks review of the Eighth Circuit's decision entered January 22, 1998. By an order entered March 6, 1998, the Eighth Circuit denied Petitioner's petition for rehearing and suggestion for rehearing en banc. Jurisdiction is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. ("IDEA"), specifically 20 U.S.C. § 1415.

STATEMENT OF THE CASE

Petitioner Eric Warner, a minor, by Linda Warner, his mother, initiated this action pursuant to IDEA in United States District Court to recover attorney's fees incurred in connection with an administrative hearing that commenced on June 22, 1995. The basis for jurisdiction in the District Court is 20 U.S.C. § 1415(e)(4)(B). In the administrative hearing, Petitioner claimed that his rights granted by IDEA had been denied. The Hearing Review Officer (HRO) ruled in favor of Petitioner and ordered, among other things, that the School District pay for an independent assessment for Petitioner by Gillette Hospital and implement the results of that assessment.

(Appendix, p. 71, 72) (Subsequently referred to as "A-__")

In an Order dated July 29, 1996, the Honorable Harry H. MacLaughlin, United States District Court, held that Petitioner was a prevailing party based on the relief that had been obtained at the administrative level and awarded Petitioner attorney's fees and costs totaling $68,921.45. (A-42, 43). The basis for the district court's conclusion was that the legal relationship between Petitioner and the School District had been altered as a result of the due process challenge. (A-31). The School District appealed. Petitioner cross appealed, maintaining that the district court erred by not granting the full amount of attorney's fees and related costs that had been requested.

In a 2-1 decision issued on January 22, 1998 the Eighth Circuit reversed the district court and remanded the case with instructions to enter judgment for the School District. (A-12) The basis for the majority's decision was that the district court misapplied the prevailing party standard. Petitioner now submits this Petition for Writ of Certiorari pursuant to Rule 10 of the Supreme Court Rules.

ARGUMENT

I. A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE EIGHTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The district court concluded that the relief awarded by the HRO resulted in a "material alteration of the legal relationship [between the parties]." (A-31). Relying on this Court's decisions in Farrar v. Hobby, 506 U.S. 103 (1992) and Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989), the district court concluded that

Petitioner was a prevailing party and therefore eligible for an attorney's fee award.

The Eighth Circuit majority opinion acknowledges that this Court's decisions regarding prevailing party status set forth the "materially altered the legal relationship of the parties" standard. The majority opinion states, however, that this standard is one "by which the Court measures how much relief on the merits is sufficient to justify at least a partial fee award; it is not a basis for awarding fees to a plaintiff who did not prevail on the merits of any claim under the fee-shifting statute in question." (A-8). This conclusion is contrary to both Farrar and Texas State Teachers Association.

In Texas State Teachers Association, the Court stated: "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 489 U.S. at 792-93. In Farrar the Court stated again: "A plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 506 U.S. at 111. Nothing in Farrar or Texas State Teachers Association supports the conclusion reached in the Eighth Circuit majority opinion that the standard set forth in those decisions measures only how much relief on the merits is sufficient to justify a fee award. As noted by Judge Gibson in his dissenting opinion, the majority opinion's conclusion "is simply contrary to the language in both Farrar and Texas State Teachers Association v. Garland Independent School District." (A-14).

This case involves an important federal question because IDEA is a remedial statute that protects the right to education of disabled children. The Eighth Circuit majority opinion not only conflicts with relevant decisions of this Court, but would also discourage potential plaintiffs from asserting their rights under IDEA. Under the majority opinion's analysis, a plaintiff

who is granted significant relief that alters the relationship of the parties would not be entitled to prevailing party status simply because the ultimate relief granted was not specified in the complaint. The majority opinion undermines the intent of IDEA as a remedial statute that protects and vindicates the education rights of disabled children. This important federal question should be resolved by this Court.

The Eighth Circuit majority opinion concluded that because the district court acknowledged that Petitioner did not succeed on the merits of the IDEA claim, the HRO's authority "obviously derived from state law." (A-9). In reaching that conclusion, the majority opinion confused this case with cases, such as those brought pursuant to 42 USC § 1983, in which a federal court renders judgment against the plaintiff on the federal claim but grants relief under pendent state law claims that were also raised. That principle is not applicable to this case because no state law claims were ever raised by Plaintiff.

In this case, only one claim was being asserted as part of the administrative hearing. That claim was brought under IDEA. At no time during the proceeding did the School District contend or argue that Petitioner's claim was a state claim.

The Eighth Circuit opinion improperly applied Reel v. Arkansas Department of Corrections, 672 N.2d 693 (8th Cir. 1982). In Reel, the plaintiff asserted claims pursuant to 42 U.S.C. § 1983 and independent state law claims of assault and false imprisonment. The court held that the plaintiff was not entitled to attorney's fees because the court found that the plaintiff had no constitutional claim and that there was no independent basis for an award of attorney's fees under the state law claims. Id. at 698.

Contrary to Reel, this case does not involve a pendent state law claim. As Judge Gibson stated in his dissenting opinion, the relief obtained by Petitioner "was authorized by

the fabric of federal and state statutes and regulations, and justifies the fee award." (A-14).

CONCLUSION

For the reasons as set forth above, Petitioner respectfully requests that a writ of certiorari be issued in this case. The Eighth Circuit has decided an important federal question in a way that conflicts with the Supreme Court decisions in Farrar and Texas State Teachers Association. Because the Eighth Circuit majority opinion is contrary to these Supreme Court decisions, the standard set forth in Supreme Court Rule 10(a) has been met.

Dated: June 3, 1998

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3669/3886MNMI

Eric Warner, a minor, by and through Linda Warner, his mother,	*	
Appellee/Cross-Appellant,	*	Order Denying Petition for
vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
Independent School District No. 625, Sued as St. Paul Independent School District No. 625,	*	
Appellant/Cross-Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 6, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3669/3886MNMI

Eric Warner, a minor, by Linda Warner, his mother,	*	Civil 4-95-889
Appellee/Cross-Appellant,	*	Appeal from the United States District Court for the District of Minnesota.
vs.	*	
Independent School District No. 625,	*	
Appellant/Cross-Appellee.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

January 22, 1998

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-3669
No. 96-3886

Eric Warner, a minor, by Linda Warner, his mother,	*	
Plaintiff - Appellee/ Cross-Appellant,	*	Appeal from the United States District Court for the
v.	*	District of Minnesota.
Independent School District No. 625,	*	
Defendant - Appellant/ Cross-Appellee.	*	

Submitted: June 13, 1997
Filed: January 22, 1998

Before LOKEN, REAVLEY,* and JOHN R. GIBSON, Circuit Judges.

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*The HONORABLE THOMAS M. REAVLEY, United States Circuit Judge for the Fifth Circuit, sitting by designation.

LOKEN, Circuit Judge.

After completing state administrative proceedings against Independent School District No. 625, which operates the St. Paul public schools, Linda Warner commenced this action to recover her attorneys' fees and costs as a prevailing party under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* ("IDEA"). The district court awarded Warner $63,501.45 in fees and $5,420.00 in costs. The School District appeals. Concluding that Warner is not a "prevailing party," we reverse.

I.

Warner's son Eric suffers from an epileptic seizure disorder. For IDEA purposes, he is "handicapped" and entitled to "special education and related services." See 20 U.S.C. § 1400(a)(1). In early 1994, while Eric was enrolled in the St. Paul public schools in third grade, an assessment team classified him as "E/BD," eligible for special education services because of an emotional/behavioral disorder. However, the team did not classify him as eligible for services because of a speech or language disorder, or as other health impaired ("OHI"). The School District formulated an Individual Education Plan ("IEP") based upon the E/BD classification and, with Warner's approval, transferred Eric to a public school offering a specialized E/BD classroom. Eric's behavior and self-control improved that spring.

For the 1994-95 school year, Warner and the School District agreed to place Eric in another school offering an E/BD classroom. By mid-year, Warner was unhappy with Eric's public school education, largely over issues unrelated to his special education needs. She hired counsel and in January 1995 made numerous requests, including that Eric spend more of the school day "mainstreamed" in regular education classes.

IDEA and Minnesota law declare a preference for educating handicapped children "in regular educational programs." 20 U.S.C. § 1414(a)(1)(C)(iv); see Minn. Stat. § 120.17, subd. 3a(4). Therefore, the School District reconvened Eric's IEP team to consider this issue.

In February, Warner removed Eric from public school and placed him in private school. In early March, the School District proposed a revised IEP for Eric's continued public school education. Warner objected, arguing that (i) Eric should not be classified E/BD handicapped; (ii) he should be classified OHI handicapped or as a traumatic brain injury student; (iii) he is entitled to speech and language therapy; (iv) the School District transferred him to a more restrictive E/BD program contrary to the 1994 IEP; (v) the School District denied Eric a "free appropriate public education"; and therefore (vi) Warner must be reimbursed for Eric's private school expenses. The School District rejected those objections.

Following unsuccessful mediation, Warner requested the due process hearing mandated by IDEA and Minnesota law. See 20 U.S.C. § 1415(b)(2) MINN. STAT. § 120.17 subd. 3b(e). After that hearing, the state Hearing Officer concluded that the School District had properly classified Eric as E/BD handicapped, had provided Eric "an appropriately individualized program designed to provide educational benefit," and had placed Eric in an appropriate, partially mainstreamed education program in a physically safe environment. Therefore, the School District need not reimburse his private school expenses. However, the Hearing Officer ordered the School District to provide ten meetings of a "facilitated friendship group" to remedy its failure to keep Warner informed and to update Eric's IEP prior to March 1995.

Warner appealed this decision to a state Hearing Review Officer. See 20 U.S.C. § 1415(c); MINN. STAT. § 120.17

subd. 3b(g). In a lengthy decision, the Hearing Review Officer concluded that the School District had properly classified Eric as E/BD handicapped, adopted IEPs providing educational benefit, provided appropriate placement in a least restrictive, safe environment, and provided Eric a free appropriate public education. Therefore, the School District need not reimburse Warner for Eric's private school expenses. The Hearing Review Officer reversed the Hearing Officer's friendship group remedy because the School District's procedural irregularities had neither deprived Eric of educational benefit nor infringed Warner's right to participate in the IEP process. However, despite concluding that the School District had complied with IDEA, the Hearing Review Officer ordered the School District to amend Eric's IEP (i) to reflect Warner's choice of school, at her expense if private school is chosen; (ii) to permit Warner to elect the Battle Creek Eisenmenger school, with "appropriate nursing services," if she returns Eric to public school; (iii) to add OHI "as a secondary handicapping condition"; and (iv) to conduct an independent educational assessment of Eric and reconvene the IEP team "to implement the results of the assessment."

Neither party appealed the Hearing Review Officer's decision, and it became final. See 20 U.S.C. § 1415(e)(1); MINN. STAT. § 120.17 subd. 3b(h). Warner then commenced this action, seeking an award of $158,753.63 in attorneys' fees and $5,420 in expert witness fees as the prevailing party under IDEA. See 20 U.S.C. § 1415(e)(4)(B). The district court concluded that Warner "did not succeed ... on the actual merits of the claim or the relief sought," that the School District "did comply with the IDEA," and that "the relief achieved is not mandated by IDEA." Nevertheless, the court held that Warner was a prevailing party entitled to an award of attorneys' fees because the state administrative proceedings had "resulted in a material alteration of the legal relationship" between the parties. Concluding that Warner's

"$158,000 fee request is far in excess of a reasonable amount in light of the results obtained," the court reduced the request by sixty percent and awarded attorneys' fees of $63,501.45 plus expert witness fees of $5,420.[1] The School District appeals. Warner cross-appeals, seeking the full $158,000 requested.

II.

It is settled in this and other circuits that a parent who has prevailed at the state administrative level may file a federal court action seeking a reasonable attorneys' fee award under IDEA. See Johnson v. Bismarck Pub. Sch. Dist., 949 F.2d 1000, 1003 (8th Cir. 1991). If the district court applied the correct legal standard in determining a "prevailing party," which is of course a question of law, we review its award of attorneys' fees for abuse of discretion. See Yankton Sch. Dist. v. Schramm, 93 F.3d 1369 1377 (8th Cir. 1996); Association for Retarded Citizens v. Schafer, 83 F.3d 1008, 1010 (8th Cir.), cert. denied, 117 S. Ct. 482 (1996). Decisions construing this term in the civil rights fee-award statute, 42 U.S.C. § 1988, "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" Hensley v. Eckerhart, 461 U.S. 424, 433 n. 7 (1983).

In Hewitt v. Helms, 482 U.S. 755, 760 (1987), the Supreme Court declared that "plaintiff [must] receive at least some relief on the merits of his claim before he can be said to prevail" for purposes of § 1988. The Court confirmed that

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[1] § 1415(e)(4)(B) does not expressly authorize an award of expert witness fees. The House Conference Committee Report said such fees could nonetheless be awarded, legislative history the Supreme Court has described as "an apparent effort to *depart* from ordinary meaning and to define a term of art." West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 91 n.5 (1991). Given our disposition of this case, we need not address whether such an award is consistent with Casey.

principle in Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S. 782, 791 (I 989), explaining that a prevailing party is "one who has succeeded on any significant claim affording it some of the relief sought." Most recently, in Farrar v. Hobby, 506 U.S. 103, 111 (1992), the Court reiterated that, "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim."

Acknowledging that Warner did not succeed on the merits of her IDEA claim, the district court awarded attorneys' fees because the Hearing Review Officer's order "materially altered the legal relationship of the parties." That phrase indeed appears in the Supreme Court's prevailing party decisions. But it is the standard by which the Court measures how much relief on the merits is sufficient to justify at least a partial fee award; it is not a basis for awarding fees to a plaintiff who did not prevail on the merits of any claim under the fee-shifting statute in question. As the Court explained in Farrar, "plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 506 U.S. at 111-12. Thus, the district court misapplied the governing prevailing party standard.

Turning to the facts of this case, the Hearing Review Officer expressly concluded that the School District did not violate IDEA. By appropriately classifying Eric's educational handicap, by developing IEPs that provided Eric education benefit, by placing Eric in appropriate school and classroom facilities, by affording Eric suitable mainstreaming opportunities, and by following procedures that allowed Warner to participate in the IEP process, the School District provided a free appropriate public education, and thereby met its substantive and procedural obligations under IDEA. See generally Board of Educ. v. Rowley, 458 U.S. 176,187204

(1982); Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607 (8th Cir. 1997). Whatever relief the Hearing Review Officer provided was not relief on the merits of Warner's IDEA claim.

The Hearing Review Officer's decision culminated state administrative proceedings. While those proceedings were an integral part of the IDEA regime,[2] the Minnesota hearing officers were charged with enforcing state law, including but not limited to the mandates of IDEA. See Minn. Stat. §§ 120.17, subd. 3a, subd. 3b(f)(3), subd. 3b(g)(3); Minn. R. 3525.4400. The Hearing Review Officer's authority to order the School District to amend Eric's IEP in the absence of an IDEA violation obviously derived from state law.[3] Minnesota could have authorized an award of attorneys' fees under state law, but it has not done so.

From the standpoint of a fee award under IDEA, this situation is most analogous to § 1988 cases in which a federal court renders judgment against plaintiff on the federal claims but grants relief under pendent state law claims. In such cases, other circuits "have uniformly held that a plaintiff who loses on the merits of its federal civil rights claim is not a 'prevailing party' for purposes of an award of attorneys' fees under 42 U.S.C. § 1988, even if it prevails on a related pendent state law claim." National Org. for Women v. Operation Rescue, 37 F.3d 646, 653-54 (D.C. Cir. 1994); see Mateyko v. Felix, 924 F.2d 824, 828 (9th Cir.), cert. denied,

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[2] The administrative proceedings satisfy Minnesota's obligation to provide due process hearings to parents if the State wishes to be eligible for federal assistance in educating handicapped children. See § 1415(a). A party aggrieved by the administrative decision may appeal to either federal or state court. See § 1415(e)(2).

[3] The Hearing Review Officer expressly based his order for an independent educational assessment on Minn. R. 3525.4000. He did not cite authority for ordering the additional amendments to Eric's IEP, but Minn. R. 3525.4400, subp. 3, seems to authorize such relief regardless of the School District's compliance with IDEA.

502 U.S. 814 (1991), and cases cited.[4] We invoked this principle in denying attorneys' fees under § 1988 in Reel v. Arkansas Department of Correction, 672 F.2d 693, 697-98 (8th Cir. 1982). We noted that the legislative history to § 1988 carved an exception to the principle for cases in which relief is granted on a pendent non-federal claim to avoid reaching the federal constitutional claim. But that exception does not apply here because the Hearing Review Officer expressly rejected Warner's IDEA claims before granting relief under state law. Similarly, we have noted that a fee award may be appropriate under the catalyst theory if defendant provides a remedy to avoid litigating a federal claim. But Warner may not invoke that theory because "[a] party ... who litigates to judgment and loses on all of his claims cannot be said to have 'prevailed'" as a catalyst. A.J. by L.B. v. Kierst, 56 F.3d 849, 865 (8th Cir. 1995).

For the foregoing reasons, we conclude that Warner is not entitled to an award of attorneys' fees and costs as a prevailing party under 20 U.S.C. § 1415(e)(4)(B) because she lost on the merits of her IDEA claims.

III.

Even if Warner were an IDEA prevailing party, we would substantially reduce the award of $63,500 in attorneys' fees. Prior to the administrative hearing, the School District made a settlement offer that included virtually all the relief later ordered by the Hearing Review Officer, plus $8,000 in compensation and attorneys' fees. At the subsequent hearing, Warner made it clear that she was dissatisfied with the School

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[4] We find support for these decisions in Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 285 (1993). After concluding that plaintiffs were not entitled to relief under the federal civil rights act, the Court denied plaintiffs attorneys' fees under § 1988 and *then* remanded for further consideration of pendent state law claims.

District for many reasons other than her IDEA complaints and intended to keep Eric in private school. In both her prehearing and posthearing briefs, reimbursement of private school expenses was the relief requested.

Viewed in this context, it is apparent that the relief ordered by the Hearing Review Officer did not provide immediate benefit. Rather, it was designed to encourage Warner to return Eric to public school by clarifying, in rather specific terms, how the School District would in that event meet its obligations under state law and the IDEA -- by performing a new educational assessment, as state law requires periodically, see MINN. R. 3525.2750, subpart 1; by amending Eric's IEP consistent with the new assessment; and by placing Eric at a public school facility of Warner's choosing that would provide him a free appropriate public education in terms of special education and related services. "Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." Farrar, 506 U.S. at 111. Merely facilitating reentry into public school is not enough. Jodlowski V. Valley View Community Unit Sch. Dist. #365-U, 109 F.3d 1250,1254 (7th Cir. 1997). While the Hearing Review Officer's relief was not completely voluntary, like that in Combs v. School Board, 15 F.3d 357, 360 (4th Cir. 1994), and Schmidt v. Special School District No. 1, 77 F.3d 1084, 1085 (8th Cir. 1996), it differed very little from what the School District voluntarily offered in settlement before the administrative hearing, which is highly relevant to the fee award issue. See § 1415(e)(4)(D), (F). In these circumstances, an award of $158,000, or even $63,500, is excessive. See Parents of Student W v. Puyallup Sch. Dist., 31 F.3d 1489, 1498 (9th Cir. 1994); Johnson v. Bismarck Pub. Sch. Dist., 949 F.2d 1000, 1003-04.

IV.

After reviewing the administrative record, we understand Warner's many frustrations with the School District that led her to place Eric in private school. Unfortunately, while her grievances were many, her IDEA claims were unsound. When Warner turned down the School District's IDEA-complying settlement offer and placed Eric in private school, she did so at her own financial risk, including the risk of paying her own attorneys' fees to pursue IDEA claims that ultimately failed. See School Comm. v. Department of Educ., 471 U.S. 359, 373-74 (1985); Salley v. St. Tammany Parish Sch. Bd., 57 F.3d 458, 468 (5th Cir. 1995). Accordingly, the judgment of the district court is reversed and the case remanded to the district court with instructions to enter judgment for the School District.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent. I would affirm the judgment of the district court and award the fee as reduced in the district court order.

The court today bases its ruling primarily on the view that the Hearing Review Officer ordered a remedy "obviously derived from state law," and, looking to cases under 42 U.S.C.A. § 1988 (West Supp. 1997), the district court could not award a fee where the plaintiff only prevailed on state law claims.

The court today improperly characterizes Warner's relief as grounded exclusively in state law, based on the court's misapprehension of the reach of the Individuals with Disabilities Education Act. The Act, 20 U.S.C. §§ 1400-1491o, sets out a program of federal assistance to state and local efforts to meet the educational needs of disabled children, but it conditions that assistance on state compliance

with certain procedures and safeguards. See 20 U.S.C. § 1412 (conditioning state eligibility for assistance on complying with numerous conditions).

While the district court was correct in referring to the independent educational assessment ordered by the Hearing Review Officer as authorized by Minnesota administrative rule, the state regulation must be viewed in its IDEA context. The IDEA specifically requires states to allow parents an opportunity to obtain an independent educational evaluation of the child. 20 U.S.C. § 1415(b)(1)(A); see 34 C.F.R. § 300.503 (1997). Federal regulations authorize an independent educational evaluation conducted by a qualified examiner not employed by the public agency responsible for the child's education, and subsection (d) specifically authorizes a Hearing Officer to request such an evaluation. 34 C.F.R. § 300.503(d). This is precisely what was ordered in this case.

Further, the provision of special education services at the private school, Tesseract, was, as stated by the district judge, consistent with the requirements of the IDEA. The Hearing Review Officer specifically ordered nursing services at the District School in accordance with state and federal law. The Hearing Review Officer also ordered that the IEP designate the student's primary disorder as E/BD (emotional/behavioral disorder), but that OHI (other health impairment) be added as a secondary handicapping condition.

While the district court and the Hearing Review Officer referred only to the Minnesota regulations, under the cooperative arrangement fostered by IDEA, the relief granted Eric sprang not only from the state statutes and regulations made to effectuate the federal programs, but was directly required by the federal statutes and regulations as well.

The court today looks at only one-half of the coin in looking to those portions of the Hearing Review Officer's opinion and the district court order stating that Warner had not succeeded in showing a violation of IDEA. To the

contrary, relief authorized by both the IDEA and Minnesota statutes and regulations was the basis for the Hearing Review Officer's order.

The case before us is therefore distinguishable from Reel v. Arkansas Dept. of Corrections, 672 F.2d 693, 697-98 (8th Cir. 1982), in which the plaintiff lost his federal claim on the merits, but sought attorneys' fees because of success on pendent state common law claims.

The court recognizes that 20 U.S.C. § 1415(e)(2) provides that a party aggrieved by the findings and decisions of the state agency may bring an action in federal or state court. Sections 1415(e)(4)(B),(C) and (D) further provide that in any action brought under the subsection, the court may award reasonable attorneys' fees to the parents or guardian of a child or youth with a disability who is the prevailing party. The relief obtained by Warner was authorized by the fabric of federal and state statutes and regulations, and justifies the fee award.

Further, I believe that the court misreads Farrar v. Hobby, 506 U.S. 103, 111 (1992). The district court concluded, accurately I believe, that, in the respects we have discussed above, Warner "did succeed in altering the legal relationship between the parties by gaining an enforceable judgment that provides some relief to Eric" and thus met the threshold requirement for prevailing party status. This court, in contrast, acknowledges that material alteration of the legal relationship appears in the prevailing party decisions, but states it is a standard by which the court measures how much relief on the merits is sufficient to justify at least a partial fee award, but not the basis for awarding fees to a plaintiff who did not prevail on the merits of any claim under the fee shifting statute. The latter conclusion is simply contrary to the language in both Farrar and Texas State Teachers Association v. Garland Independent School District. 489 U.S. 782 (1989), that "[t]he touchstone of the prevailing party

inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." Garland Indep. School Dist., 489 U.S. at 789, quoted in Farrar, 506 U.S. at 111.

The School District's behavior has been modified in ways that directly benefit Eric, as we have described above. The district court rejected arguments that the relief obtained was gratuitous or de minimis. I would award fees and affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

ERIC WARNER, a minor, by and through LINDA WARNER, his mother,

Plaintiff,

Civil No. 4-95-889

v.

MEMORANDUM OPINION AND ORDER

INDEPENDENT SCHOOL DISTRICT NO. 625, ST. PAUL,

Defendant.

James Thompson and Robert C. Long, Kennedy and Graven, Chartered, 470 Pillsbury Center, Minneapolis, MN 55402, for Plaintiff.

Paul C. Ratwick and Nancy E. Blumstein, Ratwick, Rozak, Bergstrom, & Maloney, 300 Peavey Bldg., 730 2nd Avenue South, Minneapolis, MN 55402, For Defendant.

This matter is before the Court on the parties' cross motions for summary judgment. The plaintiff's motion will be granted in part and the defendant's motion will be denied.

Introduction

The Individuals with Disabilities Education Act ("IDEA") is intended to "assure that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(c). IDEA entitles parents of disabled children to an impartial local due process hearing to challenge the educational programs offered to their children. 20 U.S.C. § 1415(b). Parents who prevail in an administrative challenge may recover their attorneys' fees under § 1415 of IDEA.

This case arises from Plaintiff Eric Warner's claim for attorneys' fees under the Individual with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et. seq. The attorneys' fees result from legal representation in a local due process hearing and state level administrative appeal which were held pursuant to § 1415 of IDEA. The claim was brought on Eric Warner's behalf by and through his mother, Linda Warner ("Warner").

Facts

Eric Warner, currently age 11, suffers from an intractable epileptic seizure disorder, caused by brain damage to his left temporal lobe that most likely occurred when he was approximately two months old. The condition cannot be completely controlled by medication.

Eric was enrolled in his St. Paul neighborhood school for kindergarten in the fall of 1989 and attended school in the St. Paul School District through February 1995. At that time, his mother removed him from his fourth grade class at the Rondo Eisenmenger site and placed him at Tesseract, a private

school located in Eagan, Minnesota. The relevant events which precipitated this decision are as follows.

In January 1994, while Eric was attending St. Paul public schools ("the District"), an assessment was conducted by the District to determine whether he was eligible for special education services under IDEA. The assessment team determined that he was eligible for special education services as a student with emotional/behavioral disorder ("E/BD"), but that he did not qualify as being "other health impaired" ("OHI"). As a result of this assessment, an Individual Education Plan ("IEP") was prepared for Eric. The IEP provided that he be given 1725 minutes of regular education and 75 minutes of special education per week in the school building he would attend if he did not have the handicapping condition. His mother approved this plan on March 5, 1994. Shortly thereafter, however, the District transferred Eric to the St. Andrews Eisenmenger[1] site, a full-time special education site with no mainstreaming. Through busing, Eric received from 0 to 300 minutes per week of mainstreaming. This placement resulted in an improvement in Eric's behavior.

For the next school year, 1994-1995, the St. Andrew's site was scheduled to change to a day treatment center not suitable to Eric's needs. Eric's mother requested that he be enrolled in a technology magnet school. Although Eric qualified for this site in other respects, the District did not place him there because that site did not have an E/BD program. Linda Warner and the District then selected the Rondo Eisenmenger site for Eric because it offered increased

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[1] The St. Paul School District has six "Eisenmenger" sites that consist of self-contained E/BD classrooms, run cooperatively with a private facility, but usually housed within buildings used for regular education. These facilities provide low student-teacher ratios and are staffed with mental health professionals and teachers licensed in teaching students with emotional and behavioral disorders. Individual and group counseling is provided.

mainstreaming (about 600 minutes per week) as well as an E/BD program. No changes were made to the 1994 IEP prior to enrolling Eric at Rondo Eisenmenger.

In late 1994, Eric's mother contacted the District about a number of complaints unrelated to Eric's special education program. On January 6, 1995, Linda Warner and her attorney met with the District. Most of the discussion at this meeting involved matters unrelated to Eric's special education; however, at this meeting she requested, for the first time, that Eric's mainstreaming time be increased.

As a result of this request the District prepared a new IEP for Eric based on the 1994 assessment. It is standard practice to convene the student's IEP team whenever a parent requests a change to an IEP. Between January 13 and March 3, Eric's IEP team and his mother, her attorneys, and school administrators met in a series of IEP meetings. Eric's mother raised concerns about Eric's special education identification (E/BD) and placement at these meetings, and these concerns were discussed with the IEP team. She also expressed her dissatisfaction with the District and requested that Eric be placed at Tesseract, a private school, at the District's expense for the remainder of his elementary education.

Several alternative placements, including private placement, were discussed and considered by the IEP team. The District believed that it could not legally grant the request for placement at Tesseract without being in violation of IDEA, and explained this to Eric's mother. The final IEP proposed by the IEP team, which included placement at a public school site, was rejected by Eric's mother. On approximately March 1, 1995, Linda Warner enrolled Eric in Tesseract.

Warner submitted written objections to the final IEP on March 13, 1995, and requested mediation in accordance with applicable state rules. On March 23, 1995, she filed a written request with the District for a local due process hearing. The

parties agreed to appoint Administrative Law Judge Sara Jay to preside as the independent Hearing Officer ("HO") at the local due process hearing

Mediation prior to the due process hearing was unsuccessful. A central point of contention was whether the District could legally place the student at Tesseract.[2] The District offered to place him at an alternative site within the District or in another public school district where he could receive appropriate special education services under his IEP. Warner rejected this settlement offer on June 1, 1995.

On June 2, Warner submitted a proposed settlement to the District in which she asserted that placement at Tesseract was authorized under Florence County School District Four v. Carter, 114 S.Ct. 361 (1993), and proposed this placement for the remainder of Eric's elementary education. The letter indicated that Eric's legal fees were approximately $50,000 at that point.

On June 10, the District made a final offer of settlement pursuant to § 1415(e)(4)(D) of IDEA. The final offer included placement in an appropriate metropolitan public school of the parent's choice (based on space availability), a lump sum payment of $5,000 for settlement of all monetary claims (such as tuition and transportation costs incurred), a payment of $3,000 for all attorneys' fees, and reclassification of Eric's disability as OHI with the understanding that Eric would continue to receive services according to his IEP and without admitting the prior classification (E/BD) was incorrect. If Warner continued to enroll Eric at Tesseract at

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[2] The parties, in the negotiations leading up to the hearing, widely differed in their interpretations of Florence County District Four v. Carter, 114 S.Ct. 361 (1995). Plaintiff asserted that this case authorized and required the District to place Eric in a private school, such as Tesseract. The District argued that this interpretation was incorrect for several reasons. The Hearing Officer concluded that placement at Tesseract at District expense was "not appropriate."

her own expense, the District would provide appropriate special education services. This offer was rejected by Warner, and on June 16, she made a counteroffer that was rejected by the District.

The Local Due Process Hearing

The local due process hearing commenced on June 22, 1995, and lasted nine days. Pursuant to the order of the HO, the plaintiff submitted a statement of specific objections and relief requested prior to the hearing. Briefly summarized from the Hearing Officer's decision, the key issues and requests for relief were:

1. Did the District properly identify Eric as a student with E/BD disorder, rather than OHI, traumatic brain injury, or a speech/language disorder?

2. Did the District fall to provide free appropriate public education by failing to provide direct speech/language therapy, by failing to provide adaptive physical education, by failing to address safety concerns as part of placement decisions, or by failing to place Eric in the least restrictive environment appropriate to his needs?

3. Should Eric be place at Tesseract at the District's expense?

4. Did the District follow required procedures with regard to Eric's program of education?

The HO issued Findings of Fact Conclusions of Law, and decision on September 14, 1995. Hearing Officer Jay's decision stated the following relevant legal conclusions:

1. At the time of the 1994 assessment, the Student met the criteria for having an emotional or behavioral disorder. (Conclusion 14).

2. The Student was not eligible for special education services as "other health impaired" (OHI) in 1994 or 1995. (Conclusion 15).

3. The Student did not meet the criteria for a student with a speech/language impairment during 1994 or 1995, or for a student requiring developmental adapted physical education, or as a student with a traumatic brain injury. (Conclusion 16).

4. The program of education implemented for the Student in April 1995 did provide, and the IEPs proposed in February-March 1995 would have provided, an appropriately individualized program designed to provide educational benefit to the Student. Further, the Student was placed in accordance principles requiring placement in the least restrictive environment with the maximum amount of regular education participation appropriate to the Student's needs. (Conclusion 19).

5. The District would have been able to provide the Student with an appropriate educational placement, in a physically safe environment. (Conclusion 20).

6. Because the program and placement proposed by the District were appropriate, reimbursement of expenses for private school placement is not appropriate. Also, placement of the student at a private school that does not provide special

education services (Tesseract) is not appropriate. (Conclusion 21).

7. The District did not show that placement of the Student was in compliance with the Student's IEP, nor that it fully informed the Parent about changes in the Student's program of education between October 1994 and February 1995. The Student was thereby deprived of the opportunity for updated goals for approximately 60 school days. (Conclusion 22).

Based on these conclusions, the Hearing Officer ordered the following relief:

1. The District was required to conduct an IEP team meeting promptly to amend the March 1995 IEP as follows:

   a. The IEP shall be amended to reflect the Parent's choice of schools for the student.

   b. If the Parent chooses to return the Student to the District Schools, she may elect the Battle Creek Eisenmenger site if appropriate nursing services are currently assigned to that site for 1995-1996 school year, rather than returning the Student to the Rondo Eisenmenger site. The District shall inform the Parent in writing of the nursing services available at Battle Creek prior to the IEP meeting.

   c. The Parent shall inform the District at the IEP meeting of her decision regarding private or public school options, and site.

d. If the site is chanced, the IEP shall be amended to state the actual site and to provide full information regarding the new site's service providers.

2. The IEP shall designate the Student as having a primary handicapping condition of E/BD. As an accommodation, and to provide notice to future teachers and programs of the seriousness of the Student's medical condition, OHI shall be added as a secondary handicapping condition.

3. The IEP short term objectives shall reflect completion dates of January 1996 for all objectives, rather than the completion dates of June 1995 for some objectives, since that time has already passed.

4. The IEP Periodic Review date shall be January, 1996, and an IEP team meeting shall be conducted in January 1996, at which time Periodic Review results shall be presented and discussed.

5. To compensate for failures to rewrite the IEP upon change of programs and to include the Parent in the Periodic Review process, ten meetings of a facilitated friendship group shall be provided to the Student, in addition to those called for in the IEP. This service shall be provided regardless of the Parent's placement choice, but if the placement is at the private school, the District may substitute ten hours of in-service training to the Student's private school teacher.

The Hearing Review Officer's Decision

On September 20, 1995, Eric's mother appealed the HO's decision. The appeal was heard by Hearing Review Officer Jerry Colglazier, appointed by the State Department of Education. He considered Warner's appeal based on a review of the entire record, a review of the specific objections of Warner, and the briefs of both parties. He issued his decision on November 4, 1995.

The HRO affirmed all of the HO's legal conclusions except the award of compensatory education through the friendship group program. With respect to that conclusion, the HRO concluded that although Eric may have been deprived of the Opportunity for updated coals for approximately 60 days, this did not constitute denial of a free appropriate public education. Therefore, the HRO reversed the HO's conclusion and decision to order a compensatory award of a ten-week friendship group program. The HRO considered and denied all of Warner's other objections and arguments.

The HRO's decision orders the following:

1. The District must conduct an IEP team meeting to amend the March 1995 IEP as follows:

    a. The IEP shall be amended to reflect the Parent's choice of schools for the student.

    b. If the Parent chooses to return the Student to the District schools, she may elect the Battle Creek Eisenmenger site. The District shall provide appropriate nursing services.

    c. The IEP shall designate the Student's primary handicapping condition as E/BD. In order to

completely inform future teachers and team members of the seriousness of the Student's medical condition, OHI shall be added as a secondary handicapping condition.

d. An independent education assessment of the Student shall be conducted by Gillette Hospital at District expense. At the conclusion of the assessment, the District shall convene an IEP meeting to implement the results of the assessment.

The Attorneys' Fee Claim

Based on the results from the local due process hearing, Warner commenced this action in United States District Court for an award of attorneys' fees under IDEA on November 30, 1995. Plaintiff's attorneys have submitted their billings records for this matter, along with affidavits supporting their fee request and hourly billing rate. The plaintiff claims to have incurred attorneys' fees totaling $158,753.63 and expert witness' fees totaling $5,420.00.

Each party moved for summary judgment and filed responsive briefs to motions of the opposing party. The matter is thus before the Court on cross-motions for summary judgment.

Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a summary judgment motion, a court must determine whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The role of a court is not to weigh the evidence but instead to determine whether, as a matter of law, a genuine factual conflict exists. AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987). "In making this determination, the court is required to view the evidence in the light most favorable to the nonmoving party and to give that party the benefit of all reasonable inferences to be drawn from the facts." AgriStor Leasing, 826 F.2d at 734. When a motion for summary judgment is properly made and supported with affidavits or other evidence as provided in Fed. R. Civ. P. 56(c), then the nonmoving party may not merely rest upon the allegations or denials of the party's pleading but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 585 (8th Cir. 1987), cert. denied, 108 S.Ct. 707 (1988). Moreover, summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Discussion

The IDEA expressly provides that a parent or guardian may, in the discretion of the court, obtain an award of reasonable attorneys' fees as part of the costs if the child or youth is the prevailing party in an action brought under the Act. 20 U.S.C. § 1415(e)(4)(B). Parents recover attorneys' fees incurred in a state administrative proceeding by filing a separate action in federal district court. Johnson v. Bismarck Public School Dist., 949 F.2d 1000, 1002 (8th Cir. 1991).

The attorneys' fee provision of IDEA is similar to the civil rights attorney's fee statute, 42 U.S.C. § 1988, see

Borengasser v. Arkansas State Bd. Of Educ., 996 F.2d 196, 199 (8th Cir. 1993), and cases interpreting attorneys' fee statutes apply the same principles to IDEA cases as to general civil rights fee cases. Phelan v. Bell, 8 F.3d 369, 373 (6th Cir. 1993)(interpretation by analogy to civil rights statutes); Combs v. School Bd. of Rockingham County, 15 F.3d 357, 360 (4th Cir. 1994). Thus, the term prevailing party," for example, connotes the same general meaning under both statutes. Combs, 15 F.3d at 360.

If the child is a prevailing party, the Court must calculate the proper amount of the award. The parent is entitled to "a reasonable attorney's fee." 20 U.S.C. § 1415(e)(4)(B). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 429 (1983). "The resulting product, [i.e., "lodestar"] is *presumed* to be a reasonable fee to which counsel is entitled." McDonald v. Armontrout 860 F.2d 1456, 1458 (8th Cir. 1988)(emphasis in original).

In some instances, the lodestar figure may be adjusted, either by statutory factors, see 20 U.S.C. § 1415(e)(4)(D)-(F), or by the twelve factors outlined in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974).[3] The addition of a bonus or multiplier, sometimes awarded under other fee statutes, is expressly prohibited by under IDEA. 20 U.S.C. § 1415(e)(4)(C). However, a fee request may be reduced in instances of "limited success" achieved by a prevailing party. Hensley, 461 U.S. at 435-37.

In her motion for summary judgment, the plaintiff seeks an award of full attorney's fees ($158,753.63) and costs ($5,420.00). The defendant opposes this request, contending

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[3] "Hensley makes clear that these factors matter only as they bear on the market rate or the hours reasonably expended." Hirsch and Sheehy, Awarding Attorney's Fees and Managing Fee Litigation, 19 n.5 (Federal Judicial Center 1994).

that the plaintiff is not a prevailing party. Defendant argues that because plaintiff is not a prevailing party, she has failed to establish an essential element of her claim, and therefore, summary judgment in defendant's favor is required. Defendant alternatively argues that no award or only limited fees are appropriate in light of the limited success achieved by the plaintiff. Finally, the defendant also contends that even if the plaintiff is a prevailing party and entitled to a fee award, issues of material fact as to the reasonableness of the fee request preclude summary judgment for the plaintiff.

I. Prevailing Party Status

A central issue in this dispute is whether or not Warner is a prevailing party for purposes of the attorneys' fee provision. A plaintiff is considered a prevailing party if she succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." Hensley, 461 U.S. at 433. A party need not prevail on all issues in the litigation, but only on an important matter in the litigation. Texas State Teachers v. Garland Independent School Dist., 489 U.S. 782, 790 (1989). Thus, "at a minimum, to be a prevailing party ...the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." Id. at 792. "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." Id. at 792-93. A plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Farrar v. Hobby, 113 S.Ct. 566, 573 (1992).

"Where a plaintiffs success on a legal claim can be characterized as purely technical or *de minimis,*" the

prevailing party threshold is not satisfied. Texas State Teachers, 489 U.S. at 792. Subsequently however, the Supreme Court has clarified, that "the prevailing party inquiry does not turn on the magnitude of the relief obtained." Farrar, 113 S.Ct. at 574.

Finally, the relief obtained must foster the purpose of the underlying statute in order for a fee award to be granted. Texas State Teachers, 489 U.S. at 794. Relief fosters the purpose of the IDEA if a handicapped child receives any appropriate special services necessary to education that the child had not received prior to the request for a due process hearing. Angela L. v. Pasadena Ind. School Dist., 918 F.2d 1188 (5th Cir. 1990).

Plaintiff asserts that she meets the prevailing party threshold because Eric is now entitled to valuable educational services not previously available, namely (1) an independent education assessment by Gillette Hospital to be conducted at the District's expense, and (2) the following educational services: (a) the parent's choice of schools, with related special education services to be provided by the District if Eric remains at Tesseract, (b) the right to placement at the Battle Creek Eisenmenger site if Eric enrolls in the public school system, and (c) nursing services for Eric at Battle Creek if he enrolls there.

The defendant asserts that the plaintiff did not succeed on any significant issue in the hearing, and therefore is not a prevailing party. Specifically, the District alleges that the Hearing Review Officer ruled against the plaintiff on all issues contested it the hearing: (1) the District properly classified Eric's disorder as E/BD, and he was not eligible under IDEA for other classifications, (2) although the District did not always follow correct procedures, the procedural inadequacies did not result in a loss of educational opportunity or infringe on his parent's rights (3) the precious IEP's provided a free appropriate public education to Eric, and

the District was not required to provide speech services, or adaptive physical education, (4) private placement at Tesseract at the District's expense was not appropriate under IDEA; and, (5) Eric was placed in the least restrictive environment and a physically safe environment. Since all of the Hearing Review Officer's legal conclusions were in the District's favor, Eric did not prevail on any significant issue, and therefore he cannot be a prevailing party," according to the defendant.

The Court concludes that the HRO's order resulted in a material alteration of the legal relationship because Eric is now entitled to an 'Independent educational assessment, and because Eric is now entitled to placement at Battle Creek with nursing services. Although the District argues that the HRO's legal conclusions establish that the District was in full compliance with IDEA requirements and did not violate Eric's rights under IDEA, the plaintiff nonetheless can point to an alteration in the legal relationship resulting from the HRO order.

Put another way, the plaintiff did not succeed on any significant legal issue or, as the defendant puts it, "on the actual merits of the claim or the relief sought," see Hensley, 461 U.S. at 433 (plaintiff must succeed "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit"), but plaintiff did succeed in altering the legal relationship between the parties by gaining an enforceable judgment that provides some relief to Eric. On that basis, the plaintiff meets the threshold requirement for prevailing party status. Farrar, 113 S. Ct. at 573 ("the plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought").

The limited nature of the relief obtained is not a basis for denying prevailing party status, because the degree of success does not affect the eligibility for an award. Farrar, 113 S.Ct. at 547. "If the plaintiff exceeds the minimum threshold of

success under the prevailing party analysis, she is entitled to recover at least some of her attorney's fees." Angela L. v. Pasadena Ind. School Dist., 918 F.2d 1188 (5th Cir. 1990). Therefore, the Court holds that the plaintiff is a prevailing party for purposes of the statute.

In arguing that the plaintiff is not a prevailing party, the defendant creatively makes two further arguments. First, the District asserts that the relief ultimately obtained was never requested prior to the hearing.[4] It argues that the plaintiff should not be granted prevailing party status based on a benefit award that was not requested prior to the initiation of the due process hearing. See Combs v. School Bd. Of Rockingham County, 15 F.3d 357 (4th Cir. 1994); Patricia E. v. Bd. Of Educ. Dist. #155, 894 F.Supp. 1161, (N.D. Ill 1995). The District asserts that as a policy matter, the law should require that it be given notice and an opportunity to provide any relief sought by a parent before it can be held liable for attorneys' fees resulting from litigation.

This is a reasonable practical consideration, but other practical considerations weigh against the District's argument. An administrative hearing officer must be able to fashion appropriate relief -- meaning relief that is just and practical under the circumstances, and that achieves the ends of the IDEA -- even if the ultimate relief may not have been initially requested by the plaintiff. To hold otherwise would unreasonably limit the administrative hearing officer's ability to resolve a dispute in a reasonable manner.

In the matter before the Court, the relief finally granted is reasonable in light of the issues raised in the due process hearing, even though it was never specifically requested. Therefore, the Court will not adopt the approach suggested by

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[4] The plaintiff contends that it did request the relief ultimately received, but the facts and documents cited by the parties support the District's claim that the relief obtained was not the relief sought in the hearing process.

the defendant as a basis for denying the summary, motion. To do so would be both a step beyond existing case law and inappropriate under the facts of this case.

In a second contention, defendant asserts that plaintiff should not be granted prevailing party status because the relief obtained was gratuitous or *de minimus*.

The defendant's argument that the relief is *de minimis* is unpersuasive because the relief does create an entitlement to an independent assessment for Eric, something that is clearly of more than de minimis value. Although the results of the assessment cannot retroactively impact conclusions about the propriety of the existing assessment, they may be used in future IEPs, thus conferring something more than a *de minimis* benefit upon Eric.

The defendant also argues that where the relief afforded is not required by law nor a remedy for a past violation of statutory obligations a plaintiff is not entitled to prevailing party status. See Hunger v. Leininger, 15 F.3d 664, 670-71 (7th Cir. 1994); De Gidio v. Pung, 920 F.2d 525 (8th Cir. 1990), L.B. v. Kierst, 56 F.3d 849 (8th Cir. 1995), and Schmidt v. Special School District No. 1, File No. 4-94-MC34 (D.C. Minn. May 18, 1995) aff'd 77 F.3d 1084 (8th Cir. 1996). The administrative order concludes that the District did not violate IDEA, but nonetheless orders relief. Defendant argues that the relief thus cannot be characterized as remedial; rather, it is prospectively declined only to improve future relations between the parent and the District. As such, it is gratuitous relief, in the view of the defendant, and should not be the basis for an award of attorneys fees.

This argument, though more persuasive than the *de minimus* argument, also fails. The independent educational assessment at district expense is a remedy specifically authorized by administrative rule. See Minn. R. 3525.4000 and 3525.4400 (1995). Furthermore, the other relief obtained by Warner, such as the provision for special education

services at Tesseract, is consistent with the requirements of IDEA. Thus, the relief, though discretionary and prospective in nature, is not really "gratuitous. Finally, the Court concludes that the cases cited by the defendant provide insufficient support for its assertion that discretionary prospective relief is insufficient to confer "prevailing party" status on the plaintiff.

The Court concludes that the relief obtained is not merely gratuitous. Therefore, the Court holds that the plaintiff is a prevailing party in the local due process administrative hearing.

II. Special Circumstances

Next the defendant argues that even if the plaintiff is a prevailing party, an award of attorneys' fees would be unjust. The IDEA provides that "the court, in its discretion, may award reasonable attorney's fees." 20 U.S.C. § 1415(e)(4)(B) (emphasis added). Courts have held that attorneys' fees should ordinarily be awarded to prevailing parties where a fee statute so provides, "unless 'special circumstances' exist to make an award unjust." Borengasser v. Arkansas State Bd. Of Educ., 996 F.2d 196, 199 (8th Cir. 1993).

Two factors are to be considered in determining if special circumstances exist: "(1) whether awarding fees would further the confessional purpose [of the Act], and (2) the balance of the equities." Abu-Sahyun v. Palo Alto Unified School Dist., 843 F.2d 1250, 1253 (9th Cir. 1993)(case remanded to the district court). In these special circumstances, even a plaintiff who formally prevails may receive no attorney's fee at all. Farrar v. Hobby, 113 S.Ct. 566, 575 (1992); Fischer v. Rochester Community Schools, 780 F.Supp. 1142, 1151 (E.D. Mich. 1991).

The District argues that the purposes of the statute are not furthered by a fee award when the District has complied with

all statutory requirements. Even though it is true, as the District claims, that the relief achieved is not mandated by IDEA, the relief does promote the purposes of the IDEA because it addresses, at least to some extent, parental concerns at the root of this litigation. In addition, a reasonable fee award would encourage the District and other schools to ensure that educational benefits are not denied to handicapped children. Furthermore, the Court finds that the balance of the equities do not weigh in favor of the District; while it did comply with the IDEA, the plaintiff has achieved beneficial relief from the suit, thus making an award of some attorneys' fees justifiable.

The defendant raises three other issues under the rubric of "special circumstances." The District claims that a complete denied of fees is proper because the fee request is inflated to an intolerable degree. Brown v. Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980). Brown involved work done by volunteer law students on a case in which related pending litigation, of which the parties were aware, was dispositive of issue. These facts made the plaintiffs request for over 800 hours of legal work "utterly unreasonable" for a "plain and simple case." Id. at 1059. The District also claims that the "bad faith" or "obdurate conduct" of the plaintiff in insisting on relief not authorized under the statute and case law "unreasonably protracted and obstructed" the IEP and settlement processes. Hyden v. Bd. Of Educ. Of Wilson County, 714 F.Supp. 290 (M.D. Tenn. 1989); Zarcone v. Perry, 581 F.2d 1039, 1044 (2nd Cir. 1978, cert. denied, 439 U.S. 1072 (1979); Burke v. Guiney, 700 F.2d 767, 773 (1st Cir. 1983).

These arguments are weak. "While the case was long and drawn out, the facts demonstrate a case of a parent aggressively seeking to obtain as much educational benefit as possible for her handicapped child. Moreover, the parties had a fundamental dispute about one IDEA case, Florence County

District Four v. Carter, 114 S.Ct. 361 (1993), which related to the request for placement at Tesseract at the District's expense. Finally, although the fee request is large and may not be fully justifiable, it is not so outrageous as to require a denial of the entire request. Brown, relied upon by the defendant, involved a substantially different factual basis than the matter now before the Court. The fee request can not be denied on this ground.

III. Calculation of the Fee Award Amount

When a court concludes that a plaintiff is a prevailing party and is entitled to a fee award, it must next calculate the proper amount of that award. A prevailing party is entitled to a reasonable fee, 20 U.S.C. § 1415(e)(4)(B), normally determined by a reasonable hourly rate multiplied by the number of hours reasonably expended. Hensley, 461 U.S. at 433. This amount, known as the "lodestar" figure, is presumed to be a reasonable fee to which counsel is entitled. McDonald v. Armontrout, 860 F.2d 1456, 1458 (8th Cir. 1988).

In the typical case, a district court will analyze the billing submissions of the attorneys and the affidavits regarding the reasonableness of the hourly rates, making adjustment as necessary to established a reasonable fee. See, Hensley, 461 U.S. at 434. The Supreme Court, has repeatedly emphasized, however, that the extent of a plaintiff's success is "the most critical factor" for the district court to consider. Hensley, 461 U.S. at 436.

The mere fact that the plaintiff is a prevailing party says little about the reasonableness of counsel's expenditure of time. Id. at 436. Where a plaintiff has obtained excellent results, [her] attorney should recover a fully compensatory fee.... If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably

expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." Id. at 435-436.

In assessing the reasonableness of a fee request where a party has obtained limited success, the Supreme Court has further held that

> "[A] district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." Such a comparison promotes the court's "central" responsibility to "make the assessment of what is a reasonable fee under circumstances of the case." Having considered the amount and nature of the damages awarded, **the court may lawfully award low fees or no fees without reciting the 12 [Johnson] factors bearing on reasonableness or multiplying "the number of hours reasonably expended . . . by a reasonable hourly rate."** (citations omitted)(emphasis added).

Farrar, 113 S.Ct. at 575. Thus, in cases of limited success, the Court may "simply reduce the award to account for the limited success." Hensley, 461 U.S. at 436-437.

Furthermore, the plaintiff has correctly and persuasively argued to the Court that dividing this case into successful and unsuccessful claims is not possible, and not required under Hensley. See Hensley, 461 U.S. at 438. With some exceptions, the claims raised on Eric's behalf all involved a common core of facts related to the nature of Eric's disability and the proper special education services he was entitled to receive from the District. The limited relief that Warner received addresses that general claim in a fashion not conducive to a division between "prevailing and losing" claims. In such cases, a district court should "focus on the significance of the overall relief obtained in relation to the

hours reasonably expended on the litigation" Hensley, 461 U.S. at 435.

The Court believes that under the specific facts and circumstances of this case, the proper approach is to establish an award based on and commensurate with the limited degree of success achieved by the plaintiff in comparison to the relief sought. This approach is appropriate because it "promotes the court's central responsibility" to award a fee that is "reasonable" in light of the success obtained, Farrar, 113 S.Ct. at 575, while simultaneously excluding any fees billed for unsuccessful Claims, excessive billing, duplicative billing, and items not recoverable under the IDEA fee statute.

The District argues that Warner achieved limited success because she did not prevail on any of her claims in the due process hearing and did not receive any of the relief she requested. Moreover, in the view of the defendant, the ultimate relief granted was of nominal" significance. As a result, the District argues for a denial of any fee as the only result consistent with the limited success of the plaintiff. See Farrar, 113 S.Ct. at 575 ("the court may lawfully award low fees or no fees").

The plaintiff cites two cases to argue that its degree of success was sufficient to justify a full fee award. In Phelan v. Bell, 8 F.3d 369 (6th Cir. 1993), the Court reversed a 25% fee award where the plaintiff prevailed only on one of four issues, and ordered full payment of the fee request. Id. at 375. Phelan involved a parent's request to have the school use electric shock treatments on her child. Id. at 371. Although this request was denied, the student's IEP was modified to provide other forms of treatment, and the court ordered a new and satisfactory IEP with alternatives that could have eventually included the shock treatment. Id. at 374. Phelan is distinguishable from the case at hand in that the administrative judge found Eric's existing IEP to be appropriate to his needs, whereas in Phelan the IEP was not

sufficient. In addition, the Phelan, court did not rule out the plaintiff s requested relief, but only ordered other alternative to be tried first.

In Das v. McHenry School Dist. #15, 41 F.3d 1510 (unpublished), 21 IDELR 927 (7th Cir. 1994), the court affirmed a full fee award when the plaintiff prevailed on only one of five issues. In Das, however, the Court found that the plaintiff prevailed "to a significant degree on the central issue of increased services." Id. at *3. Moreover, in that case, the fee request totaled only $11,000.95, far less than the $158,000 in fees requested by Warner. Since Hensley requires a comparison between the degree of success and the fee request, 461 U.S. at 435-40, Das is of no avail to the plaintiff. The $11,000 award in Das was reasonable in light of the results, but the same cannot be said of a $158,000 fee request in light of the lesser success achieved in the case now before this Court.

The Court is unpersuaded by the arguments made for a full fee award. The Court concludes that the $158,000 fee request is far in excess of a reasonable amount in light of the results obtained in the administrative process. The defendant succeeded on neither of her central contentions, that Eric was improperly classified or that Eric should be enrolled in Tesseract at the District's expense. Moreover, the HO concluded that the District had not violated any of its obligations under IDEA. Finally, the relief achieved is only prospective in nature. These considerations make a full fee award unjustifiable.

Because the relief is prospective and equitable in nature, its real impact and value is difficult to quantify. Nevertheless, the HO and HRO believed that an individual educational assessment would be significant both in improving relations between the school and the parent and in assuring that Eric receives all of the special education benefits to which he is entitled. Moreover, the relief also guarantees Eric certainty of

choices if he returns to the public school system and special education services at Tesseract if he does not. In the future, this relief could be of substantial benefit to Eric. If so, it would amount to achievement of one of the significant goals of the litigation instituted by his mother -- a better educational program for her child.

Viewed in this light and taking into consideration all of the facts and circumstances, the Court has concluded that Warner is entitled to an award of 40% of her requested attorneys' fees and 100% of her costs incurred.[5] The Court believes that an award of this amount is proper when the success achieved is compared to the relief sought because the 40% figure is a reasonable approximation of the likely benefits accruing to Eric in the future from relief obtained through this litigation in comparison to the specific relief sought for Eric at the outset of the litigation.

IV. The Settlement Offer

Finally, the defendant argues that the fee request must not include any fees incurred after the District's June 10, 1995 settlement offer. The IDEA statute provides that when a timely settlement offer is made and not accepted within ten days,

> no award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if

[5] Warner has already paid over $154,000 of the total fees billed and all of the $5,420 in costs, which are attributable to expert fees.

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

20 U.S.C. § 1415(e)(4)(E). An exception to this provision allows a fee award when the parent is "substantially justified in rejecting the settlement offer." 20 U.S.C. § 1415(e)(4)(F).

The District's June 10 offer contained the following provisions: (1) $5,000 in settlement of all monetary claims (such as tuition at Tesseract) in return for a full release from all claims; (2) reclassification of Eric as OHI; (3) parent's choice of metropolitan public school placement, based on space available-, (4) appropriate special education and related services if the parent chooses to enroll Eric at Tesseract; and, (5) $3,000 for attorneys' fees. Warner rejected this offer. Approximately three-fourths of the requested attorneys' fees are billed after June 10, 1995.

The plaintiff asserts that the offer was not more favorable than the HRO's decision for the following reasons: (1) choice of schools was conditioned on "space availability" in the District's offer, but not in the HRO decision; (2) nursing services were not expressly part of the District's offer; (3) the District's offer did not include an independent assessment; and, (4) the District's offer required a release of all claims[6] and provided only $3,000 for attorney's fees. The plaintiff also argues that she was substantially justified in rejecting the offer because it did not provide an independent assessment it required a release of all claims, and it provided her inadequate attorney's fee compensation.

The District argues that all of the HRO's relief, with the exception of the independent assessment was offered in the

[6] The plaintiff has brought a number of non-IDEA claims against the school district in a separate suit.

proposed settlement, including nursing services which were part of the March IEP included in the offer. The offer of a monetary settlement and some attorneys' fees goes beyond the HRO's decision, and the District suggests this benefit outweighs the award of an 'independent educational assessment. Moreover, the District argues that the offered monetary settlement is more favorable to the plaintiff than an independent education assessment because monetary recovery is precisely what the plaintiff sought in the hearing, whereas she never specifically requested the independent assessment.

The Court finds that the offer is not greater than the relief finally granted for two reasons. First, the independent educational assessment is significant in itself and as a tool to shape future educational decisions. Second, the parent's choice of school is not limited to a space available basis in the HO decision. Finally, the release by plaintiff of all other claims, of whatever type or character, was a significant drawback in the settlement offer. The District's monetary offers do not outweigh these educationally oriented considerations and legal considerations. Therefore, partial summary judgment for the defendant on this ground must be denied.

Conclusion

Accordingly, based on the foregoing, and all the files, records, proceedings and arguments of counsel, **IT IS ORDERED** that:

1. Defendant's Motion for Summary Judgment on the plaintiff's attorneys' fees petition (Doc. No. 15) is denied;
2. Plaintiff's Motion for Summary Judgment (Doc. No. 2 1) on its petition for attorneys' fees is granted in part;
3. Plaintiff Linda Warner is entitled to attorneys' fees from Defendant Independent School District, No. 625, St. Paul

in the amount of $63,501.45 and expenses and costs in the amount of $5,420.00.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/
Judge Harry H. MacLaughlin
United States District Court

Dated: July 29, 1996

JERRY L. COLGLAZIER

Attorney at Law
Mediator

4328 Messersmith Drive **Telephone 317-882-9411**
Greenwood, IN 46142

November 4, 1995

Robert J. Wedl
Assistant Commissioner
Minnesota Department of Education
Capitol Square, 550 Cedar Street
Saint Paul, MN 55101

RE: Hearing Review Officer Decision

Eric Warner, Student, and St. Paul Independent School District 625

Dear Sir:

Enclosed please find an original of the Hearing Review Officer's Findings of Fact, Conclusions of Law, and Decision in the appeal of the due process hearing of Eric Warner and Independent School District No. 625.

Duplicate originals of the Decision have been mailed to Robert C Long, Esq., counsel for Parent and Student, and Paul Ratwik, Esq., counsel for the School District, and to A. W. Ciriacy, Jr., Due Process Specialist, MDE.

/s/
JERRY L. COLGLAZIER
Hearing Review Officer

cc: Robert C. Long, Esq.
Paul Ratwik, Esq.
A. W. Ciriacy, Jr.

LEVEL II ADMINISTRATIVE APPEAL
BEFORE A HEARING REVIEW OFFICER
FOR THE
STATE OF MINNESOTA

IN THE MATTER OF
ERIC WARNER, STUDENT

and

ST. PAUL INDEPENDENT SCHOOL
DISTRICT NO. 625

HEARING REVIEW OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

The above entitled matter was appealed to a Hearing Review Officer appointed by the Minnesota Commissioner of Education for Findings and Conclusions pursuant to Minnesota Statute, section 120.17, subdivision 3a and the standards requirements, and principles in parts 3525.4400, subparts 2 and 3, and 35251200 to 3525.4700.

The Hearing Review Officer shall issue the appeal decision based upon a review of the local decision and the entire record. The Hearing Review Officer shall seek additional evidence if necessary and may afford the parties an opportunity for written or oral argument. A hearing held to seek additional evidence must be an impartial due process hearing but is not a contested case hearing.

The decision of the Hearing Review Officer is final unless appealed by the Parent (Student) or the school board to the district court in the county in which the school District, in whole or in part, is located.

If the District his to implement the Hearing Review Officer's decision, the Parent shall have the right to bring the failure to the attention of the Commissioner.

This matter came on for Level I hearing before Administrative Law Judge Sara D. Jay (HO). Hearing was held on June 22, 23, 26, 27,28, 29, 30, July 11, and 13, 1995.

The hearing was closed and was conducted in the offices of the District.

Robert Long, Esq., and James Thompson, Esq., Kennedy & Graven, Minneapolis, MN, appeared on behalf of Eric Warner (Student), and his parent, Linda Warner (Parent). Paul Ratwik, Esq., and Nancy Blumstein, Esq., Ratwik, Roszak, Bergstrom & Maloney, Minneapolis, MN, appeared on behalf of St. Paul Independent School District No. 625 (District).

The HO granted extensions of time beyond the 45 day period to complete the testimony and compile the evidence consisting of the record. The record closed August 14, 1995, upon filing of post-hearing briefs. The HO issued her Findings of Facts, Conclusions of Law, and Decision on September 14, 1995.

The Parent filed a timely appeal on September 20, 1995. The HRO was duly appointed, and the Record of the Level I proceedings were timely delivered to the HRO.

There was no additional testimony at the Level II proceeding. Pursuant to a procedural and briefing schedule ordered by the HRO during an initial telephone conference between the HRO and respective counsel, Parent objections to specific findings of fact, specific conclusions of law, and specific portions of the order were filed, followed by briefs and memorandums of law by Parent, and reply brief and memorandum of district.

Thereafter, following review of the entire record and Level II briefs, the HRO advised respective counsel during a telephone conference that because of diverse testimony in the

record regarding the Student's educational assessment, the HRO's Decision would include an Order for an independent educational assessment of the Student. Although Counsel for District objected to the Order of independent educational assessment, Counsel and the parties agreed the assessment would be conducted by Gillette Hospital.

Counsel and the HRO discussed timelines. Parent requested an extension of the 30 day timeline for HRO decision which was granted. An Order on Extension to render and mail decision was entered extending the date for decision to November 6, 1995.

Pursuant to 3525.4700, the HRO is to issue a final independent decision based upon an impartial review of the local decision and the entire record. The HRO's final decision must be in writing, include findings and conclusions, and be based on the standards in Minnesota Statutes, section 120.17, subd 3a, and the standards, requirements, and principles in parts 3525.4400, subparts 2 and 3, and 3525.0200 to 3525.4700.

IT IS EXPRESSLY NOTED THAT NEITHER IDEA NOR THE MINNESOTA STATUTES REQUIRE THE HEARING OFFICER OR THE HEARING REVIEW OFFICER TO INCLUDE A MEMORANDUM WITH THE FINDINGS, CONCLUSIONS AND ORDER.

In conducting the impartial review of the entire record, the HRO should not disturb the context of the conclusions of law or orders of the HO unless the decision of the HO:

1. is arbitrary or capricious;
2. is an abuse of discretion;
3. is contrary to law, contrary to a constitutional right, power, privilege, or immunity;
4. exceeds the jurisdiction of the HO;
5. was reached in violation of an established procedure, or
6. is unsupported by substantial evidence.

In conducting an impartial review of the entire record and the local decision in accordance to the stated standards, the HO's findings, conclusions an order must be given due weight because the HO observed the demeanor, assessed the credibility, and determined which Witnesses were more persuasive in their testimony.

HO STATEMENT OF ISSUES:

The HO framed the issues in the level I hearing to be as follows:

1. Did the District properly identify the Student as a student with emotional behavioral disorder, rather than other

health impaired, traumatic brain injury, or having a speech language disorder?

2. Did the District fail to follow required procedures with regard to the Student's program of education?

3. Did the District fail to provide a free appropriate public education (FAPE) to the Student in any of the following respects:

a. Should the District have provided direct speech/language services for the Student?

b. Should the District have provided adaptive physical education services for the Student?

c. Did safety concerns make placements or programs inappropriate?

d. Did the District place the Student in the least restrictive environment appropriate to his needs?

4. Shall private school placement be the responsibility of the District, either for reimbursement or future placement?

5. If the District failed to provide a FAPE for the Student, what compensatory education is appropriate, if any?

HO DECISION:

The HO entered, in part, the following Decision:

"The District shall conduct an IEP team meeting ... to amend the March 1995 IEP in accordance with this Decision in the following respects:

"1. The IEP AM be amended to reflect the Parent's choice of schools for the Student.

a. If the Parent chooses to continue the Student's education at the private school at her own expense, as a parental option under Minnesota law, the District shall make services available as it does other private school students. in accordance with state law and the needs identified in the Student's March 1995 IEP. The District shall inform the Parent in writing prior to the IEP meeting of services available and manner of delivery to private school students attending school outside the District boundaries.

b If One Parent chooses to return the Student to the District schools, she may elect the Battle Creek Eisenmenger site if appropriate nursing services are currently assigned to that site for the 1995- 1996 school year, rather than returning the Student to the Rondo Eisenmenger site. The District shall inform the Parent in writing of the nursing services available at Battle Creek prior to the IEP meeting

c. The Parent shall inform the District at the IEP meeting of her decision regarding private or public school options, and site.

d. If the site is changed, the IEP shall be amended to state the actual site and to provide full information regarding the new site's service providers."

"2. The IEP shall designate the Student as having a primary handicapping condition of E/BD As an accommodation, and to provide notice to future teachers and programs of the seriousness of the Student's medical condition, OHI shall be added as a secondary handicapping condition."

"3. The IEP short-term objectives shall reflect completion dates of January 1966 for all objectives, rather than the completion dates of June 1995 for some objectives, since that time has already passed."

"4. The IEP Periodic Review date shall be January 1996, and the IEP team meeting shall be conducted in January 1966, at which time Periodic Review results shall be presented and discussed."

"It is further ordered that, to compensate for failures to rewrite the IEP upon change of programs and to include the Parent in the Periodic Review process, ten meetings of a facilitated friendship group shall be provided to the Student, in addition to those called for in the Student's IEP. Service shall be provided whether or not the Student is re-enrolled in a District school. However, if the student is not re-enrolled in a District school, the District may substitute ten hours of consultation or in-service training offered to the Student's private school teacher, at the sole option of the District."

The Student filed Motion for Amendments to the HO's findings, conclusions and decision, and proposed additional findings, conclusions and decision. In addition to recommending stated proposed findings, the Student objected, in part or in whole, to HO Findings 1, 5, 7, 8, 11, 13, 16, 18, 19, 23, 24, 25, 27, 31, 33, 34, 38, 41, 42, 47, 48, 51, 54. 57, 58, 59, 60, 65, 67, and 68,.

In addition to recommending stated proposed conclusions, the Student objected, in part or in whole, to HO Conclusions 14, 15, 16, 19, 20, 21, 24, and 25.

Finally, Student proposed amendments to Orders 1(a) and 2 of the Decision.

Upon an impartial review of the local decision and the entire record, the Hearing Review Officer makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. This matter is properly before the Hearing Review Officer pursuant to Minnesota Statute section 120.17, subd 3a, and the standards, requirements, and principles in parts 3525.4400, subparts 2 and 3, and 3525.0200 to 3525.4700, and the HRO has the authority to hear, review and rule upon all matters presented herein.

2. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact.

3. The Student is eleven years of age with a date of birth of 9-7-94.

4. Student has an intractable epileptic seizure disorder as a result of brain damage particularly to his left temporal lobe, which cannot be completely controlled by medications. The left temporal lobe, in part, controls receptive and spoken language, mathematics, and right side bodily functions. The probable cause of the disorder is DPT encephalophathy incurred at approximately two months of age.

5. Student has been treated with a large number of various medications in an attempt to manage his disorder which falls in the most severe eight percent of people with epilepsy.

6. Epileptic seizures can have an adverse impact on behavior, academic and social performance.

7. Student was enrolled in the District's early Childhood Special Education Program in the fall of 1988 receiving

services for speech/language disorder pursuant to his IEP. The Student left the program on October 28, 1988, to attend day care.

8. Student was reassessed upon entering kindergarten and a determination was made that Student was not eligible for special education services. Ex. 81. The student was enrolled in his neighborhood school for kindergarten, first and second grades. His report cards reflected at or above grade level in academic and social areas even though he experienced excessive absenteeism.

9. Parent requested special education assessment in November 1991, because of the Student's intractable seizure disorder and difficulty in social interaction with his peers. The Assessment Team Summary Report's (Ex. 54) interpretation of assessment results is, in part, as follows:

> ". . . (Student) is functioning at age/grade level expectancy in all areas of school performance and behaviors, except social skills which are mildly immature compared to his peers.
>
> There is considerable discrepancy between (Student's) performance at school and at home. He appears to function successfully in school where there is a structured environment with clear expectations. His teachers have also made adaptations that are successful for (Student).
>
> The child Study Team has determined that, at this time, (Students) seizure disorder does not interfere with his ability to successfully achieve in the school curriculum and to develop appropriate school behaviors. No seizures have been reported by school personnel."

As a result of the assessment District determined Student was not in need of special education services.

10. From August 1990 through at least January 1992, Student received speech therapy through private sources.

11. In September 1992, (while a second grade student), Parent requested special education services for Student. The assessment team consulted with the Director of Special Education, suggested a social skills group and observation to see if further special ed was needed, and declined further formal assessment. The record does not reflect parental appeal (request for due process hearing or filing of Complaint) thereof.

12. Student was hospitalized in April 1993 following a reported suicide attempt. Thereafter, he participated in a day treatment program at Fairview Riverside Medical Center. A diagnosis in October 1993 included "intermittent explosive disorder, overanxious disorder of childhood, cyclothymia versus bipolar II disorder, attention deficit hyperactivity disorder; developmental language disorder, social emotional developmental delays; history of partial complex and grand mal seizure disorder; stressors extreme to catastrophic with accident breaking vertebra and multiple situational issues." Ex. 88 QQQ.

13. Student was later injured in an automobile accident. and following recovery began third grade on October 12, 1993, on a half day basis. Parent again requested (November 1993) another assessment.

14. During this period Student left the classroom, recess, class lines in hallways without permission. left the building

and hid within the building in stairwells, air ducts and other places. Tr. 1266. Student reportedly had a history of flight to escape social problems. Tr. 1279. Student would lay on or under tables refusing to move or to comply with staff requests. Tr. 1266.

15. An aide was assigned to accompany the Student throughout the school day at the request of Parent and the school principal during the assessment process. Tr. 940-946, Ex. 88 QQQ.

16. Student was having behavioral/emotional problems at this time. Assessment dated 11-15-93 (See Ex. 88 QQQ). The report noted health problems affect on the Students general performance as:

* Seizures - none observed at school so far, but if he is having absence seizures, he has the potential to miss assignment directions, parts of stories, and so on.

* Behavioral/emotional concerns - refusal behaviors he has shown keep him from the learning setting and from having an opportunity for positive interactions with peers and staff.

Current level of performance assessments noted:

* Although (Student) missed some school due to a change in seizure medication, this is not a big concern. . . . . He has been assigned a 1:1 aide.

* Behavioral and emotional concerns are evident every day by his refusal to go to class and then by his disruptive behavior in some classes.

* Social/emotional exhibited refusal behaviors include pretending to sleep in class, hiding in school building, verbally refusing to go to class, stating no one at school cares for him, swearing, worries of teasing, thrown easily by changes and adjusting slowly.

17. The CELF-R test, Language Processing Test (LPT), and Test of Auditory Comprehension of language-Revised (TACL-R) were given to assess communication.

Scores on tests requiring understanding of language, including oral directions and categorizing words that are related or unrelated were slightly below average. Student had a significantly low score on the receptive test requiring an understanding of semantic relationships in spoken sentences. Ex. 35, p 1b.

18. In assessing Student's functional skills, an October 1991 assessment and WISC-R were reviewed which revealed Student to be functioning in the average cognitive range.. Motor skills, academic progress, and functional skills were rated as age appropriate.. Ex. 35.

19. The Student's behavior and social, emotional status revealed severely discrepant scores. Anecdotal reports by staff included reports of refusal to do assignments, refusal to enter class, leaving the classroom, and hiding in the building. Ex. 35.

20. In January 1994 the assessment team determined Student was eligible for special education services as a student with an emotional behavioral disorder (E/BD). The team determined Student was not eligible for services as a student with a speech/language disorder because of the overall communication scores. The team also determined the

Students functioning in the regular education classroom did not qualify him for services as OHI. Ex 35.

21. District has self-contained E/BD classrooms operated cooperatively with a private facility at six "Eisenmenger" sites, some of which are solely E/BD, and some providing regular education. The Eisenmenger sites provide low staff to student ratios (1:10 or fewer), are staffed with mental health professionals and teachers licensed in teaching students with emotional and behavioral disorders, and provide individual and group counseling. The Eisenmenger/St. Andrews site, an E/BD Site I facility was suggested as appropriate. Tr. 29-30,

22. The assessment team concluded that Student needed a highly structured setting that would address social, emotional, and behavior needs, and safety needs which would be difficult in a regular classroom setting. Ex. 34.

23. The IEP reflects placement in the "school building learner would attend if he did not have handicapping condition(s)" with 1725 minutes of regular education and 75 minutes of special education per week. Ex. 34. Parent approved the IEP on March 5, 1994.

24. On March 11, 1994, District stated that Students current placement at Groveland was not meeting his needs and recommended a transfer to St. Andrews, a self-contained site of full time special education with no mainstreaming. Mainstreaming was accomplished by busing students to a nearby site. District did not implement the February 9, 1994, in the mainstream classroom at Groveland. Ex. 34.

25. Prior to the students transfer to St Andrews there was no change to the February 1994 IEP. The St. Andrews site

was without mainstreaming which did not comply with the February 1994 placement in an E/BD Site 1 with total mainstreaming. Student received 0 to 300 minutes per week of mainstreaming, instead of 1725 minutes per week provided in the IEP.

26. Student often perceived that other students were teasing or making , fun of him. On one occasion Student left the building without permission and walked to a dock at a nearby lake before being discovered missing from the classroom.

The Student's behavior did improve. The social worker noticed a decrease in the number of angry outbursts. The Student made progress in individual and group therapy by increasing participation, a willingness to listen to others, and being able to become calm more quickly. Tr. 219-221, 172, 167-169, 170-172, Ex.83.

The Parent also stated the Student was successful at the E/BD site, and that it had been a calming experience for him. Tr. 1718.

27. Commencing shortly after April 12, 1994, Student was provided two mainstream classes but refused to attend the second mainstream class.

28. In May 1994, Student was tested by his private speech therapist who recommended the Student receive one to one therapy on interpreting situations, learning appropriate behavioral responses, and understanding what should be taken literally and what should not. Tr. 1180, Ex- 85.

29. The E/BD Site 1 program was scheduled to change to a day treatment center for school year 1994-95 providing

more therapy than needed by Student. The Parent then applied for Student's enrollment to a technology magnet school. Although Student met other eligibility criteria, the program was not appropriate as it did not have a E/BD program. The Parent and District then selected the Eisenmenger Rondo Site (E/BD Site 2) which would offer additional mainstreaming opportunities. Tr. 188.

30. There were no changes to the February 1994 IEP prior to enrolling Student at Rondo. The IEP provided for 1725 minutes of mainstreaming per week, however, the Student only received 600 minutes per week for the first two and one half months.

31. The HO Findings of Fact 35, 36, and 37 are incorporated herein and made a part hereof.

32. Student was mainstreamed for one period per day beginning the third week of classes. Approximately one month later Student was mainstreamed from 9:30 to 11:20 each morning.

33. Student was permitted to return to the EBD site from mainstream classes at any time he desired after advising the mainstream teacher where he was going. He could speak with his social worker, special education classroom teacher, or go to the intervention room.

34. The HO Findings of Fact 42, 43, 44, 45, 46, 49, 50, 52, 55, 56, and 57, are incorporated herein and made a part hereof.

35. During a meeting in February 1995 several issues were discussed including the Parent concerns of Student's physical and mental state, and the Parents belief that the

District could not meet Student's needs. Parent requested District to place Student in a private school, Tesseract. Tr. 972.

36. Tesseract is a private non-religious school without special education classes or special education services. The school has low student to staff ratios, and the teachers are licensed by the State of Minnesota. Although the school does not have a full time nurse, a teacher is a nurse and is in the building all day wherein nursing services may be provided if needed. Tr. 1437.

37. The HO Findings of Fact 60, 61, 62, 63, 64, 65, 66, 67, 68, and 69, are incorporated herein and made a part hereof.

38. Witnesses for each party had differing interpretations of Student's eligibility for special education because of a E/BD classification, OHI classification, and TBI, and also disagreed if prior diagnoses were currently valid.

39. Parent has alleged in the appeal that the HO failed to apply the correct legal standard in determining the Student's special education disability as E/BD, i.e., exhibited a pattern of unusual behavior..."

Based upon the foregoing Findings of Fact, the Hearing Review Officer makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. This matter is properly before the Hearing Review Officer pursuant to Minnesota Rule 3525.4600 and Minnesota Statute 120.17 subd. 3b, and the HRO, has the authority to hear and rule upon all matters presented herein.

2. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact.

3. The hearing procedures in this matter provided adequate due process. The record demonstrates the District fulfilled all procedural obligations. Minn. Stat. Section 120.17 and Minn. Rule 3525.

4. Student properly perfected an appeal in this matter. The requirement of Minn. Stat. Sec. 120.17 that a final independent decision must be rendered by the HRO within 30 days after the filing of the appeal was waived by Parent. Appropriate Orders of Extension of Time for Decision were prepared for the Record.

5. The Student qualifies as a handicapped child within the meaning of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sec. 1401, et seq, and a child with a disability within the meaning of Minn. Stat Sec. 120.17 et seq.

6. Eligibility criteria for special education services for students with E/BD are outlined in Minn. Rule 3525.1329 E/BD is defined as an established pattern characterized by one or more of the following behavior clusters:

A. severely aggressive or impulsive behaviors;

B. Severely withdrawn or anxious behaviors, general pervasive unhappiness, depression, or wide mood swings; or

C. Severely disordered thought processes manifested by unusual behavior patterns, atypical communication styles, and distorted inter-personal relations.

See Subpart 2 for criteria for determination of eligibility.

7. Eligibility criteria for special education services for students as OHI are outlined in Minn. Rule 3525.1335. OHI is defined as a broad range of medically diagnosed chronic or acute health condition that may adversely affect academic functioning and result in the need for special education instruction and related services. The decision that a specific health condition qualifies as OHI will be determined by the impact of the condition on academic functioning_rather than by the diagnostic label given the condition.

See Subpart 2 for criteria for determination of eligibility.

8. Eligibility criteria for special education services for students with speech or language impairments are outlined in Minn. Rule 3525.1343. Subpart 1 defines and lists criteria for fluency disorder; subpart 2, voice disorder; subpart 3, articulation disorder; and subpart 4, language disorder.

9. Eligibility criteria for special education for students requiring developmental adapted physical education are outlined in Minn. Rule 3525.2345. Developmental adapted physical education is defined as specially designed physical education and services for students with disabilities who have a substantial delay or disorder in physical development. Developmental adapted physical education may include development of physical fitness, motor fitness, fundamental motor skills and patterns, skills in aquatics, dance, individual and group games, and sports.

See Subpart 2 for criteria for determination of eligibility.

10. Minn. Rules did not have a definition of, or criteria for, a student with traumatic brain injury (TBI) at the time of the Student's last assessment.

11. The HO concluded that the District has shown by a preponderance of the evidence that at the time of the 1994 assessment, the Student met criteria for having an E/BD within the meaning of Minn. Rule 3525.1329, "in that he exhibited a pattern of unusual behavior." The HO found in support of her conclusion that the Student left class situations without permission or warning, was physically aggressive toward two staff members, and exhibited oppositional behavior resulting in difficulty of forming satisfactory interpersonal relationships with peers and adults.

12. The HO further concluded the District established by a preponderance of evidence that the Student did not meet criteria for a student with a speech/language impairment during 1994 or 1995, was not a student with a traumatic brain injury, and did not require developmental adapted physical education.

13. The HO further concluded the District established by a preponderance of the evidence that the Student was not eligible for special education services as OHI in 1994 and 1995 because his educational performance, academic progress, organizational and work skills, and ability to complete tasks within routine timelines were average or above average during the period.

14. Although the language of the HO (exhibited a pattern of unusual behavior) is not the correct legal standard, the use of this incorrect terminology is at best harmless error. A

review of the HO decision confirms the HO applied the criteria of Minnesota Rules to the testimony and evidence presented at the hearing. The HO concluded that at the time of the January 1994 assessment, the behavior of the Student was consistent with two of the three clusters set out in the eligibility criteria for E/BD.

15. A review of testimony and evidence presented at the hearing does raise a concern if the behavioral patterns meets the degree of severity as contained in Minn. Rule 3525.1329. This concern is further aggravated by the difference of opinion of the various of witnesses and experts testifying or presenting evidence at the hearing.

Notwithstanding the HRO concerns expressed herein, the HO fully considered the evidence and testimony presented at the hearing, was able to assess the demeanor and credibility of the witnesses and was in the best position to determine which witnesses were more persuasive in their testimony.

It would be inappropriate for the HRO to attempt to give different weight or gather different inferences from the evidence presented to the HO in the original proceeding.

The conclusions of the HO concerning the Student's classification as E/BD rather than OHI, TBI, and that the Student did not meet the criteria for speech language disorder, and developmental adapted physical education is not arbitrary or capricious, is not an abuse of discretion, is not contrary to law, and is supported by substantial evidence. Therefore, the HO decision concerning classification is affirmed.

16. The classification. under which a student is classified for special education services neither determines nor defines the program of education that a student is provided. Rather

than focusing on a student's medical diagnosis or the particular etiology of disability, IDEA focuses on how a student's disability manifests itself in an educational setting. Specifically, under IDEA:

> ... the issue is not whether the child has a particular physical condition, but whether the child's educational performance is adversely impacted by such a condition to the extent (the child) requires special education and/or related services which is the criterion for classification under the...definitions of a child with a disability. (34 C.F.R. 300.7). Therefore, the fact that a child has...a certain disability is not dispositive of the question of whether (the child) should be classified as a child with a disability for educational purposes.

Board of Education of the East Syracuse-Minoa Cent. School Dist., 21 IDELR 1024 (New York 1994).

17. The current validity of student's educational assessment was raised, in varying degrees, by Student's mainstream teacher, social workers, special education teachers, and medical professionals. Conversely, several teachers, team members, and medical professionals were of the opinion the assessment was appropriate.

Minn. Rule 3525.4000 grants the HO the authority to Order an independent educational assessment of a child or regular education student at the District's expense.

Minn. Rule 3525.4600 provides the HRO shall seek additional evidence if necessary.

Minn. Rule 3525.4700 provides the HRO's Final Decision must be based on the standards, in part, of Minnesota Rules in 3525.0200 to 3525.4700. Thus, the HRO has the powers of the HO in seeking additional evidence and ordering an independent educational assessment.

18. An independent educational assessment is required, however, the results of the assessment shall not impact the HO or HRO conclusions concerning the present classification.

19. The HO concluded the District has shown by a preponderance of the evidence that the program or education implemented for the Student in April 1995 did provide, and the IEP proposed in March 1995 would have provided an appropriately individualized program designed to provide educational benefit the Student.

The HO further concluded the District has shown that it placed the Student in accordance with principles requiring placement in the least restrictive environment with the maximum amount of regular education participation to the Student's needs.

The HO further concluded that such placements within schools in the District would be able to provide the Student an appropriate placement in a physically safe environment.

The HO conclusions thereon are affirmed.

20. As a matter of law, the prevailing rule in federal courts is that reimbursement is not required in parental unilateral private placement cases unless the proposed placement or IEP is found to be inappropriate.

In School Committee of the Town of Burlington, Massachusetts v. Department Education, 471 U.S. 359 (1985), the Supreme Court considered the stay-put provisions of IDEA when presented with the issue of whether the act requires reimbursement to parents who reject a proposed IEP and place the child in a private school without the consent of local school authorities. The Court held as follows

> This is not to say that [IDEA stay-put] has no effect on parents. While we doubt that this provision would authorize a court to order parents to leave their child in a particular placement, we think it operates in such a way that parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately decide that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated [stay-put].

See also Bernardsville Board of Education v. J. H., 42 F.3d 149, 157, 162, 165 (3rd Cir. 1994). Dreher v. Amphitheater Unified School District, 22 F. 3d 228, 233-234 (9th Cir. 1994); Hall v. Shawnee Mission School District, 856 F. Supp. 1521-1527 (D. Kan. 1994).

Accordingly, the HO conclusion, that because the program and placement proposed by the District were appropriate, reimbursement for unilateral placement of the Student in the private school is not available, is affirmed.

21. The District has shown by a preponderance of the evidence that indirect speech/language services is appropriate.

22. The HO concluded (see HO Conclusion 21) that the District has not shown that its placement of the Student was in compliance with the Student's IEP, nor that it fully informed the Parent about changes in the Student's program of education, particularly between October 1994 and February 1991 Following October 1994, the Parent was not informed of the IEP Periodic Review results. The Student's IEP was not discussed or modified until early 1995, despite the fact that he had completed nearly all of the short term objectives of his 1994 IEP. The Student thereby was deprived of the opportunity for updated goals for approximately 60 school days.

The HO is correct in stating compensatory education is an available remedy where a district has failed to provide services that it was obligated to provide, and that the scope of compensatory education ordered should be consistent with the extent to which the child would have been entitled to services. (HO Conclusion 23).

A review of the local decision and the entire record reveals that the District did not always follow correct procedures in implementing the Student's program of education. It is well settled principle of federal law that procedural irregularities which have only a minimal effect upon a student's placement or overall program of education does not constitute a denial of a free appropriate public education (FAPE). W. G. v. Board of Trustees, Target Range School District No. 23, 960 F.2d 1479 (9th Cir. 1992). To find FAPE has been denied, the procedural inadequacies must result in the loss of educational opportunity or seriously infringe upon parents right to participate in the IEP formulation process.

Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987), failure to document a change in the IEP would not result in a denial of FAPE if it was clear that the parent had been provided a meaningful opportunity to participate in the child's educational planning.

Thomas v. Cincinnati Board of Education, 918 F A 618, 625 (6th Gin 1990), district's failure to provide parents notice of a change in placement was harmless error when the parent had received oral notice of the change and fully participated in the decision.

The only area the HO found error requiring compensatory education was the failure to provide a friendship group as early as November 1994.

Although the Student may have completed many short term objectives, a careful review, of the record does not reveal the Student as denied an educational benefit or was denied FAPE.

Therefore the HO's conclusion that the Student was deprived of the opportunity for updated goals for approximately 60 days requiring compensatory education of ten weeks in a friendship group is arbitrary and capricious, is an abuse of discretion, is contrary to law, and is unsupported by substantial evidence and must be reversed.

It is inappropriate to award compensatory education when their was no denial of FAPE and the Student received an educational benefit from his program of education.

23. The HRO has carefully and fully considered all of the Parent's arguments of additional errors in the HO decision, and carefully and fully examined the entire record herein.

Any additional Motions for amendment and error not specifically discussed herein are denied.

DECISION

Based upon the foregoing Findings of Fact and Conclusions Of Law, IT IS HEREBY DECIDED AND ORDERED THAT:

1. The District shall conduct an IEP team meeting to amend the March 1995 IEP as follows:

A. The IEP shall be amended to reflect the Parent's choice of school for the Student. If the Parent elects to continue Student's education at the private school, it shall be at the Parent's expense. The District shall make services available to the Student in accordance to state and federal law and the needs identified in the Student's March 1995 IEP.

B. If Parent elects to return the Student to District schools, she may elect the Battle Creek Eisenmenger site. District shall provide appropriate nursing services.

C. The IEP shall designate the Student's primary handicapping condition as E/BD. In order to completely inform future teachers and team members of the seriousness of the Student's medical condition, OHI shall be added as a secondary handicapping condition.

D. An independent education assessment of the Student shall be conducted by Gillette Hospital at District expense. The assessment team shall be advised of the complete text of definitions and entrance criteria of the following:

Minn. Rule 3525.1329 Emotional or Behavioral Disorders;

Minn. Rule 3525.1335 Other Health Impaired;

Minn. Rule 3525.1343 Speech or Language Impairments;

Minn. Rule 3525.1343

Minn. Rule 3525.1348 Traumatic Brain Injury (TBI) Definition and Entrance Criteria; and

Minn. Rule 3525.1352 Developmental adapted Physical Education: Special Education.

At the conclusion of the independent educational assessment, the District shall convene an IEP team meeting to implement the results of the assessment.

Entered this 4th day of November, 1995.

/s/
JERRY L. COLGLAZIER
Hearing Review Officer

PURSUANT TO MINN. STAT. SEC 120.17 SUBD. 3B(h) THE DECISION OF THE HEARING REVIEW OFFICER SHALL BE FINAL UNLESS APPEALED BY THE PARENT OR SCHOOL BOARD TO THE COURT OF APPEALS. THE JUDICIAL REVIEW SHALL BE IN ACCORDANCE TO CHAPTER 14.

IF THE DISTRICT FAILS TO OMPLEMENT THE HRO'S DECISION, THE PARENT SHALL HAVE THE

RIGHT TO BRING THE FAILURE TO THE ATTENTION OF HTE COMMISSIONER.

§ 1415. Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such. child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in **a** hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the

records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if—

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that-

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the
controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of handicapped children and youth, except that

before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(Pub. L. 91-230, Title VI, § 615, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788, and amended Pub.L 99-372, §§ 2, 3, Aug. 5, 1986, 100 Stat. 796, 797; Pub.L. 100-630, Title 1, § 102(e), Nov. 7, 1988, 102 Stat. 3294.)

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SUPREME COURT, U.S.

No. 97-2014

In the

Supreme Court of the United States

October Term, 1997

ERIC WARNER, A MINOR, BY AND THROUGH LINDA WARNER, HIS MOTHER,

Petitioner,

v.

INDEPENDENT SCHOOL DISTRICT NO. 625, ST. PAUL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION

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QUESTION PRESENTED

The hearing review officer (HRO) affirmed School District had provided Student with a free appropriate public education (FAPE) and had properly assessed Student's disability under the Individuals with Disabilities in Education Act (IDEA) and state law. It nevertheless ordered an independent assessment of Student under state law. The district court held Parent did not succeed on the actual merits of her claims but was still a "prevailing party" entitled to attorneys' fees under federal law, 20 U.S.C. § 1415(e)(4)(B) (1994), because the HRO's order materially altered the parties' legal relationship. The question presented is:

> Whether the Eighth Circuit properly concluded Parent was not a "prevailing party" entitled to attorneys' fees under federal law, 20 U.S.C. § 1415(e)(4)(B) (1994).

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OPINIONS BELOW

The opinion of the court of appeals (A-3--A-15) is reported at 134 F.3d 1333 (8th Cir. 1998). The opinion of the district court (A-16--A-43) is reported at 26 IDELR 831 (D. Minn. 1996). The opinion of the hearing review officer (A-46--A-73) is not reported.

STATUTES AND REGULATIONS INVOLVED

This case involves 20 U.S.C. § 1415 (1994) of the Individuals with Disabilities in Education Act (IDEA) (A-74--A-79); Minn. Stat. § 120.17, subd. 3b (1994) (R. App. 1--R. App. 5); Minn. R. 3525.4000 (1995) and Minn. R. 3525.3300 D (1995) (R. App. 6).

Minnesota Rule 3525.4000 (1995) provides in relevant part: "If a hearing officer requests an independent educational assessment of a child . . ., the cost of the assessment shall be at district expense."

STATEMENT OF THE CASE

Most pertinent facts are set out in the court of appeals' decision (A-4--A-7) and are thus incorporated by reference. Still, certain facts must be highlighted.

Parent Linda Warner's initial request for a due process hearing alleged violations of IDEA, 20 U.S.C. § 1400 *et seq.* (1994), and Minnesota law, Minn. Stat. § 120.17 (1994) and Minn. R. 3525.0000 *et seq.* She claimed Student had been improperly classified as having an emotional or behavioral disorder (E/BD), had been denied a free appropriate public education (FAPE), and was thus entitled to an award of private school expenses. (A-5). Pursuant to 20 U.S.C. § 1415(e)(4)(D)(1994), the School District made a settlement offer (1) of $5000 to settle all Parent's monetary claims, (2) to place Student in an appropriate public educational placement in a Twin Cities' area public school of Parent's choice based

upon space availability or to provide Student with special education services at a private school selected and paid for by his Parent, (3) to classify Student as Other Health Impaired ("OHI") on his individualized education plan (IEP), and (4) to pay $3000 for attorneys' fees and costs. (A-41). Parent rejected this offer. (A-12). After a nine-day due process hearing, the hearing officer rejected all of Parent's claims and concluded that the School District had provided FAPE. (A-5). Parent appealed. Id.

Contrary to Parent's assertion (Petition at 1), the hearing review officer (HRO) ruled in the School District's favor. He affirmed the hearing officer's decision in all matters relevant to the instant decision. (A-70). Relying on Minnesota Rule 3525.4000 (1995) (A-66), the HRO also ordered the School District to conduct an independent assessment of Student, applying state criteria. (A-71--A-72). The HRO expressly ruled the assessment results would not affect his conclusion or the conclusion below that the School District properly classified Student's disability as E/BD. (A-67). Neither party appealed, and that decision became final. (A-6).

Parent then filed this action for attorneys' fees under 20 U.S.C. § 1415(e)(4)(B) (1994), seeking fees of over $158,000, and expert witness fees of $5,420. Parent claimed, among other things, that the independent assessment order made her a "prevailing party." The School District denied Parent was a prevailing party and contended the fees were unreasonable. Upon the parties' cross-motions for summary judgment, the district court acknowledged "plaintiff did not succeed on any significant legal issue or, . . . 'on the actual merits of the claim or the relief sought.'" (A-31--A-32). It nevertheless awarded attorneys' fees because the HRO's order "materially altered the legal relationship of the parties." (A-8, A-31). Finding the fees "far in excess of a reasonable amount in light of the results obtained," the district court reduced the attorneys' fees to $63,501.45.

The Eighth Circuit reversed. Applying this Court's precedents, it held Parent was not entitled to any attorneys'

fees. It ruled, despite the independent assessment order, Parent was not a "prevailing party" because she lost on the merits of her IDEA claims. (A-10). It also stated if she were an IDEA prevailing party, the court would substantially reduce the award because the relief did not provide direct and immediate benefit to Student. Rather, it was designed to encourage and facilitate Student's reentry into public school. Finally, it noted the School District had made an offer of settlement in accordance with 20 U.S.C. § 1415(e)(4)(D) (1994) which Parent rejected "at her own financial risk, including the risk of paying her own attorneys' fees to pursue IDEA claims that ultimately failed." (A-12).

REASONS FOR DENYING THE PETITION

I. Because the Eighth Circuit's Decision Is Consistent With Settled Law, the Petition Should be Denied.

To be awarded attorneys' fees under IDEA, Parent must meet a two-part test: First, she must establish she is "prevailing party" under 20 U.S.C. § 1415(e)(4)(B)(1994). Second, she must establish the fees sought are reasonable. Id. Parent only challenges the Eighth Circuit's decision that she was not a "prevailing party." She does not challenge the court's decision (A-11) that the fees awarded were excessive.

A. The Eighth Circuit's "prevailing party" decision is consistent with this Court's decisions.

The Eighth Circuit's decision is consistent with a long-line of attorneys' fees cases out of this Court discussing who is a "prevailing party." In Hewitt v. Helms, 482 U.S. 755, 760 (1987), this Court declared: "Respect for ordinary language requires that a plaintiff receive at least some relief ***on the merits of his claim*** before he can be said to prevail." (Emphasis added). This Court cited this same language with approval in Texas State Teachers Ass'n v. Garland Indep.

School Dist., 489 U.S. 782, 791 (1989), explaining a "prevailing party" is "one who has ***succeeded on any significant claim*** affording it some of the relief sought." Id. (emphasis added). In Farrar v. Hobby, this Court reiterated "to qualify as a prevailing party, a civil rights plaintiff must obtain ***at least some relief on the merits*** of his claim." 506 U.S. 103, 111 (1992) (emphasis added).

> [A] plaintiff "prevails" when ***actual relief on the merits of his claim*** materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Id. at 111-112 (emphasis added). Relying on these cases, the Eighth Circuit properly reversed the district court. These cases mandate that a plaintiff receive at least some relief on the merits of her claims. As the district court acknowledged and is undisputed, however, Parent received no relief on the merits of her claims. "[H]er IDEA claims were unsound." (A-12).

Ignoring the legal requirement of success on the merits, Parent contends, and the district court agreed, that a "material alteration in the parties' legal relationship" is a sufficient basis to make a plaintiff a "prevailing party." The appellate court correctly rejected a prevailing-party test based solely on this language. Acknowledging the existence of the "material alteration" language in this Court's opinions, the Eighth Circuit stated this language

> is the standard by which the Court measures how much relief on the merits is sufficient to justify at least a partial fee award; it is not a basis for awarding fees to a plaintiff who did not prevail on the merits of any claim under the fee-shifting statute in question.

(A-8).

Claiming the Eighth Circuit's interpretation conflicts with Farrar and Garland, Parent brings this Petition. What the Eighth Circuit meant by its interpretation is not entirely clear. On the one hand, the court may have meant that to prevail, plaintiff must show not only that she received relief on the merits of her claim but also that the relief was "material."[1] On the other hand, it may have meant that materiality goes to the reasonableness of the fee.[2] Either way, no compelling reason

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[1] Support for this interpretation is found in Farrar and Garland. In Garland, this Court held to cross the prevailing-party threshold, the plaintiff must have succeeded on a significant issue in litigation which achieved some of the benefit the party sought in bringing suit. It noted "the floor in this regard" is provided by the Hewitt v. Helms decision, in which this Court recognized "a party who litigates to judgment and loses on all of his claims . . . [cannot] be a 'prevailing party'," 482 U.S. 755, 757. Garland, 489 U.S. at 792. While this Court made its first reference to a "material alteration of the legal relationship" in Garland, id., nowhere did the Court indicate it was abandoning its long-standing requirement that plaintiff receive some success on the merits of plaintiff's claims. Indeed, in Farrar, this Court again recognized that the plaintiff must receive "actual relief on the merits of his claim." 506 U.S. at 111. Such relief must also "materially alter[] the legal relationship between the parties." Id. This language may imply that an "immaterial alteration" will not make a party "prevail." For example, while Hewitt received a favorable judicial ruling that his constitutional rights were violated, that ruling did not make him a prevailing party because he did not get relief on any of his claims. In other words, that favorable ruling or "relief" was "not material."

[2] The Garland Court discussed a "material alteration in the legal relationship" in the context of whether the "plaintiff's success on a legal claim [could] be characterized as purely technical or *de minimis*." 489 U.S. at 792. Then, in Farrar, Justice O'Connor noted:

> While Garland may be read as indicating that this *de minimis* or technical victory exclusion is a second barrier to prevailing party status, the Court makes clear today that, in fact, it is part of the determination of what constitutes a reasonable fee. . . . When the plaintiff's success is purely technical or *de minimis*, no fees can be awarded.

exists to grant the Petition. The court's interpretation is consistent with the referenced cases. The result here would be the same even if the court had made no attempt to explain the "material-alteration" language because Parent did not prevail on any of her claims, as this Court has consistently required.

The Eighth Circuit correctly rejected the argument that a "material alteration in the parties' legal relationship" is a litmus test to determine who is a prevailing party. Rather to cross the prevailing-party threshold, plaintiff must show ***at least*** some success on the merits of the party's claims.[3] The law still provides that "a party who litigates to judgment and loses on all of his claims . . . [cannot] be a 'prevailing party' for purposes of an award of attorney's fees." Hewitt, 482 U.S. at 757; A.J. by L.B. v. Kierst, 56 F.3d 849, 865 (8th Cir. 1995).

B. A "material-alteration test" would lead to absurd results.

This Court has never held a "material alteration in the parties' legal relationship" is sufficient to make a party a "prevailing party." To adopt this test would lead to absurd results. Suppose a school district wanted to perform an assessment, for example, and the parent refused permission.

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506 U.S. at 117 (O'Connor, J., concurring). Consistent with this reading, she rejected the notion that Farrar's success was "material" simply because he got one seventeenth millionth of what he sought. Id. at 121-22.

[3] "At least" is used here because other factors bear on whether the party has prevailed. For example, this Court has looked at whether (1) the "defendant's behavior [has been modified] in a way that directly benefits the plaintiff," (2) the "relief . . . directly benefit[ed] [plaintiff] at the time of the judgment or settlement," (3) plaintiff is "entitled to enforce a judgment, consent decree or settlement against defendant," (4) "plaintiff can point to the resolution of the dispute," and (5) plaintiff got "some of the relief sought." Farrar, 506 U.S. at 110-12; Garland, 489 U.S. at 791-92; Hewitt, 482 U.S. at 764. Parent did not satisfy any of these other factors either.

If the school district pursued this issue in a due process hearing and an assessment were ordered, the parent could claim the parent "prevailed" because the order for assessment would result in a "material alteration in the parties' legal relationship." This is an absurd result because the parent ***opposed*** the assessment, lost on her claim, and did not get what she wanted ***in substance***. On the other hand, the school district got what it sought--the assessment--but would be forced to pay the parent's attorneys' fees.

C. Additional grounds support the decision.

Additional bases support the Eighth Circuit's decision to deny fees altogether. "In some circumstances, even a plaintiff who formally 'prevails' . . . should receive no attorney's fees at all." Farrar, 506 U.S. at 115.

The Eighth Circuit suggested it would deny all fees even if Parent were a "prevailing party." The court held the relief ordered by the HRO did not directly benefit Student at the time of judgment, as required by Farrar, 506 U.S. at 111, and Hewitt, 482 U.S. at 764. The independent assessment was designed to encourage Parent to return Student to public school. Merely facilitating reentry into public school is not enough to make Parent a "prevailing party." (A-11). Jodlowski v. Valley View Community Unity School Dist. No.365-U, 109 F.3d 1250, 1254 (7th Cir. 1997).

Furthermore, the relief ordered "differed very little from what the School District voluntarily offered in settlement before the administrative hearing." (A-11). In agreeing with the School District that the fees awarded were excessive, it cited Parents of Student W. v. Puyallup School Dist., 31 F.3d 1489, 1498 (9th Cir. 1994), and Johnson v. Bismarck Pub. School Dist., 949 F.2d 1000, 1003-04 (8th Cir. 1991). In both cases, the parents formally prevailed but the courts denied attorneys' fees.

As the court hinted, denial of fees would also be proper under 20 U.S.C. § 1415(e)(4)(D) and (F) (1994). (A-13).

Under (D), fees should be denied where the school district's settlement offer is more favorable than the relief obtained. The record reflects the school district's offer was more favorable than what Parent ultimately received. The District previously offered everything ordered by the HRO, except the assessment. In fact, it offered more, including $5000 for all monetary claims and $3000 for attorneys' fees. Parent got none of this relief from the HRO. Under (F), fees should be denied where the parent unreasonably protracts the final resolution or the fees are excessive given the nature of the proceedings. The proceedings were unreasonably protracted and the fees here were excessive because no hearing was necessary to get an independent assessment. Parent could have requested and obtained an independent assessment at any time, and the School District would have had to pay for it unless it contested the assessment at a hearing. Minn. R. 3525.3300 D (1995); 34 C.F.R. § 300.503(b) (1995). Parent never did request such an assessment. (A-32 & n. 4) Ruling against Parent, the Eighth Circuit held, "Warner turned down the School District's IDEA-complying settlement offer and placed Eric in private school . . . at her own financial risk, including the risk of paying her own attorneys' fees to pursue IDEA claims that ultimately failed." (A-12).

Other bases, not ruled on by the Eighth Circuit, also support the denial of fees. An award of something Parent did not seek and which the School District did not deny does not support prevailing-party status. See e.g., Garland, 489 U.S. at 791 (party must get some relief sought); Parents of Student W., 31 F.3d at 1498 (parents did not get any of eight types of relief requested); Combs v. School Dist. of Rockingham County, 15 F.3d 357, 363 (4th Cir. 1994) (award of additional therapy not previously requested did not make parent prevailing party). Parent has also failed to establish a causal connection between the relief obtained and the administrative proceedings and that the relief would not have been provided without the proceedings. See Payne v. Board of Educ., Cleveland City Schools, 88 F.3d 392, 399 (6th Cir. 1996);

DeGuido v. Pung, 920 F.2d 525, 528 (8th Cir. 1990). Where, as here, the relief was not provided to remedy a legal violation and was available without resorting to a hearing, the relief is gratuitous or of *de minimis* benefit and does not entitle the parent to fees. See Combs, 15 F.3d at 364; Urban by Urban v. Jefferson County School Dist. R-1, 89 F.3d 720, 729 (10th Cir. 1996) (parent denied all fees, though he received some relief he sought, but did not receive placement at neighborhood school). Because ample law supports the Eighth Circuit's decision, the case is unworthy of review.

II. This Case Presents No Issues of General Importance Because the Law Upon Which Parent Relies Has Been Amended.

The law upon which Parent relies has been amended. Under current law, as amended, a similarly-situated parent would not be entitled to any attorneys' fees. Given the change, this case presents a legal issue of significance only to the parties and not worthy of review.

Effective August 1, 1995, after the commencement of the due process hearing, the following law became applicable:

> Within five business days after the request for a hearing, or as directed by the hearing officer, the objecting party shall provide the other party with a brief written statement of particulars of the objections, the reasons for the objection, ***and the specific remedies sought***.

1995 Minn. Laws ch. 3, art. 3, § 2 (codified at Minn. Stat. § 120.17, subd. 3b(e) (1996)) (emphasis added). Effective June 4, 1997, section 1415 of IDEA was amended as follows:

> The procedures required by this section shall include--
> . . .

(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)--

(A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

(B) that shall include--

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) ***a proposed resolution of the problem*** to the extent known and available to the parents at the time.

20 U.S.C.A. § 1415(b)(7)(1998 Supp.) (emphasis added). More important, a provision was added requiring attorneys' fees to be reduced if the attorney representing the parents did not provide, among other things, "a proposed resolution of the problem." The law states:

> If the court finds that the "attorney representing the parent did not provide to the school district the appropriate information in the due process complaint ***in accordance with subsection (b)(7)***. . . the court ***shall reduce***, accordingly, the amount of the attorneys' fees awarded" under 20 U.S.C. § 1415.

20 U.S.C.A. § 1415(i)(3)(F)(iv)(1998 Supp.) (emphasis added).

Although this law became applicable after Parent commenced this attorneys' fees action, the change emphasizes the insignificance of the instant case. Congress intends that fees should not be awarded automatically, even if the parent prevails. Rather, parents will be expected to propose a resolution. If they fail to do so and get some arguable benefit

not proposed, as in this case, attorneys' fees will presumably be reduced and may be denied altogether.

Given these amendments, the Petition should be denied. Little purpose would be served by having this Court provide guidance on an out-dated, less specific version of the law which has no bearing on cases filed within the last year or more and which has no future application. See Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974).

III. Parent's Other Bases for Review Are Meritless.

A. The assessment ordered pursuant to Minnesota law did not entitle parent to fees under federal law.

The Eighth Circuit also denied fees relying on an analogy to federal civil rights cases in which the court renders judgment against plaintiff on federal claims but grants relief under pendent state claims. In those cases, courts uniformly deny attorneys' fees under 42 U.S.C. § 1988. See National Org. for Women v. Operation Rescue, 37 F.3d 646, 653-54 (D.C. Cir. 1994); Mateyko v. Felix, 924 F.2d 824, 828 (9th Cir. 1990), cert. denied, 502 U.S. 814 (1991).

Despite Parent's objection, this analogy was properly applied here. The Minnesota hearing officers were charged with enforcing state law, as well as IDEA. (A-9). In ordering an assessment, however, the HRO expressly relied on state law, Minn. R. 3525.4000 (1995). (A-9 & n. 3). In addition, the HRO rejected the IDEA claims. Thus, as the court noted, this situation is much like cases in which the plaintiff prevails on a related pendent state claim but loses on the federal claim and cannot therefore recover fees under federal law.

Parent's contention that this analogy is inapposite because she brought only one claim--a claim under IDEA (Petition at 4)--is contrary to the record. Parent relied heavily on state law and claims. (See e.g., Complaint, ¶ 8; Appellant's Appendix Vol. I in Eighth Circuit at Ap-299-309). Her

Complaint admits alleging violations of Minnesota Statutes §§ 120.17, 127.03, and Minnesota Rules in the administrative proceedings. (Complaint, ¶ 8). In arguing the inappropriateness of Student's disability classification in the administrative proceedings, Parent relied on Minnesota Rules which define various disability categories. (See Appellant's Appendix Vol. I in Eighth Circuit at Ap-369, 374, 376).

Now, however, Parent seems to argue the HRO made an error of law when he issued his order relying on state law and should have relied on federal law. Because she did not appeal that order, she has not properly preserved this claim. That order is final. 20 U.S.C. § 1415(e)(1)(1994); Minn. Stat. § 120.17, subd. 3b(h)(1994). (A-6). The HRO's legal conclusions are binding. See Plough v. West Des Moines Community School Dist., 70 F.3d 512, 515 & n. 6 (8th Cir. 1995); Yancy v. McDevitt, 802 F.2d 1025, 1028 (8th Cir. 1986). No reversible error exits where complainant, as here, has invited the error by propounding law which she now claims is inapplicable. See City of Springfield v. Kibbe, 480 U.S. 257, 258 (1987); Dillon v. Nissan Motor Co., Ltd., 986 F.2d 263, 270 (8th Cir. 1993).

The fact that an independent assessment might also have been available under IDEA's implementing regulations, as Parent and the dissent now argue, is irrelevant and does not entitle Parent to fees under IDEA. The assessment was ordered ***after*** Parent lost on her IDEA claims. "[W]here it is clear that the claims that provide for attorneys' fees had nothing to do with plaintiff's success, Hensley v. Eckerhart [461 U.S. 424 (1983)] requires that fees not be awarded on the basis of those claims." Smith v. Robinson, 468 U.S. 992, 1009 & n. 12 (1984). Moreover, for the reasons stated above, the HRO's legal conclusions cannot be rewritten now to be premised on federal law simply because Parent deems it expedient. To permit such, would render the finality of all special education decisions in doubt.

As the Eighth Circuit noted, Minnesota law makes no provision for attorneys' fees in special education cases. (A-9).

Because the independent assessment order was based on state law, the Eighth Circuit properly refused to award fees under IDEA.

Finally, the analogy to pendent state claims is just that--an analogy. Parent's lack of success on the merits of her claims, as well as other grounds mentioned herein, amply support the decision. The decision does not stand or fall on the basis of this analogy. Thus, the Petition should be denied as meritless.

B. The decision is not contrary to IDEA's intent.

Contrary to Parent's contention, the decision does not "undermine the intent of IDEA as a remedial statute that protects and vindicates the education rights of disabled children" or discourage plaintiffs from asserting their IDEA rights. (Petition at 4). In the proceedings below, which Parent did not appeal, it was determined the School District had provided Student with FAPE and had properly assessed his disability. Accordingly, this case is not important to protect Student's rights, let alone all disabled children. Moreover, this case does not warrant this Court's attention unless, of course, a parent who loses her federal claims is nevertheless a "prevailing-party" because she obtained relief under state law which was never sought from or denied by the school district.

Where, as here, a student has been provided with FAPE, parents should not be able to recover attorneys' fees. Fairness to students in real need of educational services demands that this litigation stop now. Denying the Petition will further IDEA's intent to ensure that school districts have sufficient resources to provide FAPE to ***all*** disabled students, 20 U.S.C.A. § 1400(d)(1)(C) (1998 Supp.). It will also finally end the ongoing waste of money needed to defend against litigation intended to enrich one parent and a team of lawyers to the disadvantage of all students.

CONCLUSION

For the foregoing reasons, the School District respectfully requests that the Petition for Writ of Certiorari be denied.

Date: July 13, 1998

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Minnesota Statutes § 120.17 (1994):

* * *

Subd. 3b. **Procedures for decisions.** Every district shall utilize at least the following procedures for decisions involving identification, assessment, and educational placement of children with a disability:

(a) Parents and guardians shall receive prior written notice of

(1) any proposed formal educational assessment or proposed denial of a formal educational assessment of their child;

(2) a proposed placement of their child in, transfer from or to, or denial of placement in a special education program; or

(3) the proposed provision, addition, denial or removal of special education services for their child;

(b) The district shall not proceed with the initial formal assessment of a child, the initial placement of a child in a special education program, or the initial provision of special education services for a child without the prior written consent of the child's parent or guardian. The refusal of a parent or guardian to consent may be overridden by the decision in a hearing held pursuant to clause (e) at the district's initiative;

(c) Parents and guardians shall have an opportunity to meet with appropriate district staff in at least one conciliation conference if they object to any proposal of which they are notified pursuant to clause (a). The conciliation process shall not be used to deny or delay a parent or guardian's right to a due process hearing. If the parent or guardian refuses efforts by the district to conciliate the dispute with the school district, the requirement of an opportunity for conciliation shall be deemed to be satisfied;

(d) The commissioner shall establish a mediation process to assist parents, school districts, or other parties to resolve disputes

arising out of the identification, assessment, or educational placement of children with a disability. The mediation process must be offered as an informal alternative to the due process hearing provided under clause (e), but must not be used to deny or postpone the opportunity of a parent or guardian to obtain a due process hearing.

(e) Parents, guardians, and the district shall have an opportunity to obtain an impartial due process hearing initiated and conducted by and in the school district responsible for assuring that an appropriate program is provided in accordance with state board rules, if the parent or guardian continues to object to:

(1) a proposed formal educational assessment or proposed denial of a formal educational assessment of their child;

(2) the proposed placement of their child in, or transfer of their child to a special education program;

(3) the proposed denial of placement of their child in a special education program or the transfer of their child from a special education program;

(4) the proposed provision or addition of special education services for their child; or

(5) the proposed denial or removal of special education services for their child.

At least five calendar days before the hearing, the objecting party shall provide the other party with a brief written statement of the objection and the reasons for the objection.

The hearing shall take place before an impartial hearing officer mutually agreed to by the school board and the parent or guardian. If the school board and the parent or guardian are unable to agree on a hearing officer, the school board shall request the commissioner to appoint a hearing officer. The hearing officer shall not be a school board member or employee of the school district where the child resides or of the child's school district of residence, an employee of any other public agency involved in the

education or care of the child, or any person with a personal or professional interest which would conflict with the person's objectivity at the hearing. A person who otherwise qualifies as a hearing officer is not an employee of the district solely because the person is paid by the district to serve as a hearing officer. If the hearing officer requests an independent educational assessment of a child, the cost of the assessment shall be at district expense. The proceedings shall be recorded and preserved, at the expense of the school district, pending ultimate disposition of the action.

(f) The decision of the hearing officer pursuant to clause (e) shall be rendered not more than 45 calendar days from the date of the receipt of the request for the hearing. A hearing officer may grant specific extensions of time beyond the 45-day period at the request of either party. The decision of the hearing officer shall be binding on all parties unless appealed to the hearing review officer by the parent, guardian, or the school board of the district where the child resides pursuant to clause (g).

The local decision shall:

(1) be in writing;

(2) state the controlling facts upon which the decision is made in sufficient detail to apprise the parties and the hearing review officer of the basis and reason for the decision;

(3) state whether the special education program or special education services appropriate to the child's needs can be reasonably provided within the resources available to the responsible district or districts;

(4) state the amount and source of any additional district expenditure necessary to implement the decision; and

(5) be based on the standards set forth in subdivision 3a and the rules of the state board.

(g) Any local decision issued pursuant to clauses (e) and (f) may be appealed to the hearing review officer within 30 calendar days of receipt of that written decision, by the parent, guardian, or

the school board of the district responsible for assuring that an appropriate program is provided in accordance with state board rules.

If the decision is appealed, a written transcript of the hearing shall be made by the school district and shall be accessible to the parties involved within five calendar days of the filing of the appeal. The hearing review officer shall issue a final independent decision based on an impartial review of the local decision and the entire record within 30 calendar days after the filing of the appeal. The hearing review officer shall seek additional evidence if necessary and may afford the parties an opportunity for written or oral argument; provided any hearing held to seek additional evidence shall be an impartial due process hearing but shall be deemed not to be a contested case hearing for purposes of chapter 14. The hearing review officer may grant specific extensions of time beyond the 30-day period at the request of any party.

The final decision shall:

(1) be in writing;

(2) include findings and conclusions; and

(3) be based upon the standards set forth in subdivision 3a and ~~in~~ the rules of the state board.

(h) The decision of the hearing review officer shall be final unless appealed by the parent or guardian or school board to the court of appeals. The judicial review shall be in accordance with chapter 14.

(i) The commissioner of education shall select an individual who has the qualifications enumerated in this paragraph to serve as the hearing review officer:

(1) the individual must be knowledgeable and impartial;

(2) the individual must not have a personal interest in or specific involvement with the student who is a party to the hearing;

(3) the individual must not have been employed as an administrator by the district that is a party to the hearing;

(4) the individual must not have been involved in the selection of the administrators of the district that is a party to the hearing;

(5) the individual must not have a personal, economic, or professional interest in the outcome of the hearing other than the proper administration of the federal and state laws, rules, and policies;

(6) the individual must not have substantial involvement in the development of a state or local policy or procedures that are challenged in the appeal; and

(7) the individual is not a current employee or board member of a Minnesota public school district, education district, intermediate unit or regional education agency, the state department of education, the state board of education, or a parent advocacy organization or group.

(j) In all appeals, the parent or guardian of the pupil with a disability or the district that is a party to the hearing may challenge the impartiality or competence of the proposed hearing review officer by applying to the state board of education.

(k) Pending the completion of proceedings pursuant to this subdivision, unless the district and the parent or guardian of the child agree otherwise, the child shall remain in the child's current educational placement and shall not be denied initial admission to school.

(l) The child's school district of residence, a resident district, and providing district shall receive notice of and may be a party to any hearings or appeals under this subdivision.

3525.3300 CONTENTS OF NOTICE.

Notices must be sufficiently detailed and precise to constitute adequate notice for hearing of the proposed action and contain a full explanation of the procedural safeguards available to parents under parts 3525.0200 to 3525.4700. Notices must:

* * *

D. Inform the parents that they may:

(1) Obtain an independent assessment at their own expense.

(2) Request from the district information about where an independent assessment may be obtained.

(3) Obtain an independent assessment at public expense if the parent disagrees with an assessment obtained by the district. The district shall initiate conciliation and a due process hearing if necessary when refusing a parent's request for an independent assessment at public expense. If the hearing officer determines that the district's assessment is appropriate, the parents still have the right to an independent assessment, but not at public expense. When an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria the district uses when it initiates an evaluation.